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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 125.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 126.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 127.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 128.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED OCTOBER 6, 1905.

(10,091 10,092 10,093 10,094)

(19,921, 19,922, 19,923, 19,924.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 20, 1905.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 *Petition of Citizens of the Cherokee Nation by Blood.*

In the Court of Claims of the United States. Departmental No. 76.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN CHEROKEE NATION BY INTERMARRIAGE

vs.

THE UNITED STATES.

I.—*Petition. Filed April* 13, 1903.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims of the United States.

The petition of Daniel Red Bird, David Muskrat, and Daniel Gritts appearing for themselves and numerous citizens of the Cherokee Nation by blood, by their attorney, John J. Hemphill, respectfully shows to this Court:

First. That the above-named petitioners and all persons for whom they appear are citizens of the Cherokee Nation by blood whose rights to participate in the distribution of the common property and funds of the Cherokee Nation of whatever kind or character has never been denied or questioned.

Second. That the citizens of the Cherokee Nation, by blood, who are interested in the above-entitled cause number several thousand persons, and are therefore too numerous to be mentioned herein by name.

2 Third. That by a certain letter from the Secretary of the Interior, dated February 24th, 1903, and addressed to this Court certain controverted questions of fact and law that have arisen in connection with the applications of persons claiming rights in the Cherokee Nation by intermarriage, to be enrolled as entitled to participate in the distribution of the common property and funds of the Cherokee Nation that are now pending in the Interior Department were submitted to this Court for its findings and opinion, as follows:

"DEPARTMENT OF THE INTERIOR,
February 24, 1903.

To the Court of Claims:

SIRS: By section 21 of the Act of June 28, 1898 (30 Stats., 498, 502), the Commission to the Five Civilized Tribes was directed to make rolls of citizenship of the several tribes, enrolling, among others, 'such intermarried white persons as may be entitled to citizenship under Cherokee laws.' By the Act of May 31, 1900 (31 Stats., 221, 236), said Commission was authorized to continue the exercise of authority theretofore conferred on it by law with a direction as follows: 'But it shall not receive, consider, or make any record of

any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.' By the Act of July 1, 1902 (32 Stats., 716, 720), further direction was given as to the making of the rolls of citizens of the Cherokee Nation as follows:

SEC. 25. The rolls of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

3 SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood, against the enrollment of intermarried persons "so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character." It is asserted on the one hand that the Cherokee laws have never recognized the right of "intermarried citizens" to share in the distribution of the property of the Nation and, on the other hand, that the Cherokee laws as well as the laws of Congress recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such Nation entitled to share equally with full-blood citizens in the property of the tribe.

The controverted questions involved in this matter now pending before this Department, are respectfully submitted for your findings and opinion in accordance with the provisions of Section 2, the Act of March 3, 1883 (22 Stat., 485). The protest referred to,

4 which states the questions involved, is enclosed herewith, and upon receiving information that any other papers in the possession of the Department are needed they will be promptly transmitted.

Very respectfully, E. A. HITCHCOCK, *Secretary.*"

Fourth. That said above-named petitioners and all the citizens of the Cherokee Nation by blood, are directly interested in the above-entitled cause in that they, together with certain other persons, citizens of the said Nation by adoption or nativity, the number of whom your petitioners are unable to state, are the owners in common of a large tract of land in the Indian Territory aggregating about 4,420,076 acres, which said tract of land is now being or about to be allotted in severalty among the citizens of the Cherokee Nation entitled to participate in the distribution of the common property of the Cherokee Tribe, in accordance with the provisions of the Act of Congress entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July 1, 1902, which act was consented to, ratified and confirmed by a vote of the people of the Cherokee Nation on the 7th day of August, 1902.

Fifth. That by the provisions of said act each person entitled to participate in the distribution of the common property of the Cherokee tribe has the right to select and have allotted to him a tract of land equal in value to one hundred and ten acres of the average lands of the Cherokee Nation, which, according to the appraisement of said lands heretofore made as required by law, is equal to $325.60 in money, and if any persons are admitted to participate in such allotment of said lands wrongfully and without right the interest of the rightful owners thereof in the surplus land or lands remaining after all having right thereto have received their allotments will be proportionately diminished.

Sixth. That after the allotment of the said lands of the Chrokee Nation as provided in the said Act of July 1, 1902, it is estimated that there will remain unallotted and not otherwise disposed of as town sites or reserved for public purposes, a large quantity of said lands, equal to about ten thousand allotments of the appraised value of about $325.60 each, or about $3,256,000 in all, as the common property of your petitioners and other citizens of the Cherokee Nation who are entitled to participate in the distribution of the common property of the Cherokee Tribe, subject to be distributed among your petitioners and such other citizens of the Cherokee Nation, or to be sold for their benefit as may hereafter be provided by agreement, and if the said persons claiming rights in the Cherokee Nation by intermarriage are recognized as being entitled to distributive shares in the common property of the Cherokee Tribe, the shares of your petitioners in said surplus lands will not only be diminished, but said surplus lands themselves would be materially reduced in quantity, all to the great damage and injury of your petitioners in their just rights and dues.

Seventh. That besides the lands hereinbefore described, your petitioners, the citizens of the Cherokee Nation by blood, and other persons referred to in paragraph fourth hereof, are jointly owners of large sums of money now held for their benefit in the Treasury of the United States aggregating about $2,719,288.90, which by the

act above mentioned, it is contemplated will in the near future be distributed per capita to the citizens of the Cherokee Nation
6 entitled to participate in the distribution of the common property of the Cherokee Tribe, after certain deductions for the expenses of the Cherokee schools and for other public purposes of the Cherokee Tribe are made therefrom, and if any person not entitled thereto be wrongfully and illegally admitted to participate in such distribution, the shares of your petitioners and of all other rightful owners of said sums will be proportionately and illegally diminished.

Eighth. That by the said act of Congress of July 1, 1902, above cited, provision is also made for the laying out, surveying, and platting of numerous townsites within the lands of the Cherokee Tribe above described, the number of which townsites your petitioners have no means of accurately determining, but your petitioners believe, and so believing, aver that there will be at least two hundred thereof. Provision is also made in said act for the appraisement and sale of the lots in such townsites and for the eventual distribution per capita of the proceeds of such sales to the citizens of the Cherokee Nation who are entitled to participate in the distribution thereof. Your petitioners have no means of determining or of ascertaining how much money will probably be realized by such sale, but they believe and so believing, aver that at least the sum of $2,000,000 will be realized by such sales, and on the distribution thereof your petitioners will be entitled to receive their pro rata shares of such proceeds, whatever the sum may be that is actually received as such; and if any persons not entitled thereto be wrongfully or illegally admitted to participate in such distribution, the shares that your petitioners should rightfully receive would be proportionately diminished.

Ninth. That beside and in addition to the property interests set forth and described in paragraphs fourth, fifth, sixth, seventh
7 and eight hereof, your petitioners are interested as part owners in common in other things of value consisting of choses in action, credits, demands and various sources of income claimed by and due to the Cherokee Nation, the value and descriptions of which your petitioners are unable here to set forth more specifically; but your petitioners' interests therein will be materially diminished if the persons claiming rights in the Cherokee Nation by intermarriage are recognized as having the right to share therein.

Tenth. That Tams Bixby, Thomas B. Needles, William A. Stanley and Clifton R. Breckenridge, composing what is known officially as "the Commission to the Five Civilized Tribes," and commonly called "the Dawes Commission," have been for some time, and are now engaged, under the direction of the Secretary of the Interior, in the preparation of a roll or of rolls of the citizens of the Cherokee Nation for the purpose of ascertaining the number and names of those persons living in the Cherokee Nation who are entitled to participate in the distribution of the common property and funds of said Nation, with a view to the allotment of the lands of the Cherokee

Tribe, above described, and the distribution per capita of the other common property of said tribe, especially the aforesaid fund of $2,719,288.90, now held in the Treasury of the United States, and such sum as shall be realized as the proceeds of the sale of lots in the town sites aforesaid; and certain persons who are not Cherokee Indians by blood nor otherwise members of the Cherokee Tribe of Indians, with any right in the property of said tribe, but who have intermarried with citizens of the Cherokee Nation by blood, Delawares, citizens of said Nation by adoption or nativity, and Shawnees, citizens of said Nation by adoption or nativity, have presented themselves before said Commission and claimed all the rights,
8 privileges and immunities of native Cherokees by reason of such intermarriages, and have demanded that they be enrolled as citizens of the Cherokee Nation and be recognized as having the right to participate in the distribution of the common property of the Cherokee Tribe, both land and money, which claim has just or reasonable foundation either in law or equity.

Eleventh. That said persons who claim rights in the Cherokee Nation by intermarriage are not entitled to participate in the distribution of the common property of the Cherokee Tribe of any kind or character or in the funds of the nation; and that, as the rolls of the Cherokee citizens, now being prepared by the aforesaid Commission to the Five Civilized Tribes, are for the sole purpose of determining the number and names of the persons in the Cherokee Nation who are entitled to participate in such distribution, which is now about to be made, they have no right to be enrolled on said rolls, and said Commission has no power or authority for so enrolling them.

Twelfth. That your petitioners are informed and believe, and so believing aver, that said persons base their claim to the right to be enrolled on the laws of the Cherokee Nation and the laws of Congress which they allege, as stated in the letter of the Secretary of the Interior set forth in paragraph third hereof, "recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation as full citizens of such Nation, entitled to share equally with full blooded citizens in the property of the tribe," all of which your petitioners deny. On the contrary, your petitioners are advised and believe, and so believing, allege and
9 declare that the Cherokee Nation never has, by any provision of treaty, agreement or act of its National Council, granted to any persons, who intermarry with citizens of the said Nation any rights whatever in the common property and funds of the Cherokee Tribe, but that by a provision contained in the laws of said Nation relating to "Intermarriage of White Men and Foreigners" that has always been and is now in force in said Nation it is specifically and expressly provided as follows:

"*Provided, also,* that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation."

Thirteenth. That your petitioners further deny that the laws of Congress recognize such intermarried persons "as full citizens of such Nation, entitled to share equally with full-blood citizens in the property of the tribe," and they aver that, on the contrary, said laws of Congress do not affirm or deny the right of any class of citizens of the Cherokee Nation to share in the property of the Cherokee tribe, except such rights as they would otherwise be entitled to under the laws of said Nation, and that as to the class of persons whose right to enrollment is involved in the above-entitled cause, said laws of Congress expressly declared the laws of the Cherokee Nation to be the criterion by which such right shall be ascertained. Your petitioners also deny that Congress has or had any power or authority to confer any right in the common property or the funds of the Cherokee tribe on any person or persons contrary to the laws of the Cherokee Nation.

Fourteenth. That your petitioners further allege that the said persons claiming rights in the Cherokee Nation by intermarriage have never been recognized by the Cherokee authorities as having any right to share in the property of the Cherokee tribe, nor have they been given any share of such property as has heretofore been distributed, except that in May, 1875, they were each given $10.55 "bread money," distributed by act of the National Council to the people of the Cherokee Nation to relieve their distress and preserve them from starvation, with which they were threatened by reason of the failure of crops caused by the continued drouths.

Fifteenth. Your petitioners allege and affirm that the uniform construction given to the laws of the Cherokee Nation relating to the intermarriage of white men and foreigners, by the council of the said Cherokee Nation and the other authorities thereof, who have in the course of their duties, been called on to construe the same, has been that persons who have by complying with said laws been privileged to reside in said Nation, acquired no rights thereby except such as were civil, political and personal, as subjects of the Cherokee Nation of Indians—without acquiring any right or title to the Cherokee domain, or to the proceeds thereof when made subject to a division among those to whom such domain had been conveyed, or to any funds of the Cherokee Tribe. As the construction of the laws of the Cherokee Nation by the authorities thereof, is binding on the courts and other authorities of the United States, and since the persons claiming rights in said Nation by intermarriage must depend entirely upon the laws of the Nation for the maintenance of such claim your petitioners allege that said persons are not entitled to be enrolled as claimed, and that the said Commission to the Five Civilized Tribes and the Secretary of the Interior ought not to so enroll them.

Prayers.

Wherefore your petitioners pray that this Honorable Court will report its findings and opinions to the Secretary of the Interior, as follows:

1. That the Cherokee Nation has never, by any treaty, agreement or act of its National Council, granted to the persons claiming rights in said Nation by intermarriage, any right, title or interest of any kind or character in or to any of the common property or funds of the Cherokee Tribe whatsoever; but that by the laws of said Nation such persons are expressly excluded therefrom.

2. That the authorities of the Cherokee Nation have never recognized any right in such persons to receive any part of such of the common property and funds of said tribe as has been heretofore distributed by said authorities among the citizens of said Nation, except $10.55 each, bread money distributed as charity in 1875.

3. That the laws of Congress recognize only such right in said persons as they claimed to under the laws of the Cherokee Nation, and no other.

4. That said persons could acquire no right of property in the Cherokee Nation without a grant of such right by the Nation lawfully given under its laws, and Congress has no power to secure to them any greater rights or privileges than those that have been so granted to them under the laws of said Nation.

5. That the courts and other authorities of the United States when construing the laws of the Cherokee Nation are bound by the interpretation thereof given by the proper authorities of said Nation, and must give force to such interpretation.

6. That said persons are not entitled to such enrollment as citizens of the Cherokee Nation as would recognize in them a right to any participation in the distribution of the common property and funds of the Cherokee Tribe of whatever kind or character.

7. Such other and further findings and opinions as in the wisdom of this Honorable Court your petitioners are entitled to have in the premises.

JNO. J. HEMPHILL,
Attorney of Cherokee Citizens by Blood.

CITY OF WASHINGTON, *District of Columbia, ss:*

Personally appeared before me, the undersigned Notary Public, John J. Hemphill, who being sworn deposes and says that he is the attorney for a large number of citizens of the Cherokee Nation by blood, including those whose names are set out in the above petition, that he is familiar with the allegations contained in the foregoing petition; and that the said allegations of the said petition are true to the best of his knowledge, information and belief.

——— ———.

Subscribed and sworn to before me this 8th day of April, 1903, at the City of Washington, District of Columbia.

EMORY H. BOGELEY.
[SEAL.] *Notary Public.*

13 Departmental No. 76.

IN THE MATTER OF THE ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE

vs.

UNITED STATES.

II.—*Answer of Certain Citizens of the Cherokee Nation Who Claim Citizenship by Intermarriage.*

Now come Francis B. Fite, W. E. Rowsey, J. O. Hall, W. E. Halsell, W. E. Hosey, William Little, D. M. Marrs, C. W. Turner, J. E. Campbell, Wm. Johnstone, William Jackson, and a large number of others, too numerous to mention, intermarried white persons, claiming to be entitled to citizenship in the Cherokee Nation, under the laws of said Nation, by their attorney, William T. Hutchings, and answering the petition herein, say:

First. That they admit the allegations of the first, second, fourth, fifth, sixth, seventh, eighth and ninth paragraphs of the petition.

Second. Answering the third paragraph of the petition, the defendants say that they admit that the letter contained in the petition from the Secretary of the Interior, dated February 24, 1903, is as set out in said paragraph.

Third. Answering the tenth paragraph of the petition, defendants say that it is true that the Commission to the Five Civilized Tribes is now engaged in the preparation of the rolls of citizens of the Cherokee Nation, but defendants deny that certain persons
14 who are not Cherokee Indians by blood, nor otherwise members of the Cherokee Tribe of Indians without any right in the property of the Tribe, but who have intermarried with citizens of the Cherokee Nation by blood, Delawares, citizens of said Nation by adoption or nativity, and Shawnees, citizens of said Nation by adoption or nativity, have presented themselves before said Commission and claimed all the rights, privileges and immunities of native Cherokees by reason of such intermarriage, and have demanded that they be enrolled as citizens of the Cherokee Nation and be recognized as having the right to participate in the distribution of the common property of the Cherokee Tribe, both land and money, which claim is not just nor has reasonable foundation either in law or equity.

Fourth. The defendants, answering the eleventh paragraph of the petition, deny that the persons who claim rights in the Cherokee Nation by intermarriage are not entitled to participate in the distribution of the common property of the Cherokee Tribe of any kind and character, or in the funds of the Nation; and allege that as to the rolls of the Cherokee citizens now being prepared who are entitled to participate in the distribution of said property and funds, they have a right to be enrolled on such roll, and that the Commis-

sion to the Five Civilized Tribes are authorized and empowered by law to so enroll them.

Fifth. Answering the twelfth paragraph of petitioners' complaint, the defendants admit that they base their claim to be enrolled as Cherokee citizens on the laws of the Cherokee Nation and on the laws of Congress set forth in said petition, and deny the al-egation of petitioners that the Cherokee Nation never has, by any provision, by treaty, agreement, or act of its National Council, granted to any persons who intermarried with citizens of the said Nation, any
15 rights whatever in the common property and funds of the Cherokee Nation.

Defendants further deny that the provision of law set forth in the said twelfth paragraph is now in force in said Nation, and allege that it was not in force at the time of the Act of Congress there set out and subsequently mentioned in said paragraph.

Sixth. Defendants, answering the thirteenth paragraph of the petition, assert that the laws of Congress simply confirmed the rights conferred upon citizens adopted into the Cherokee Nation by intermarriage, and placed such intermarried citizens on an equal footing with the citizens by blood of said Nation, which said laws have been in force with a short interim since the..... day of..... 1855.

Seventh. Defendants, answering the fourteenth and fifteenth paragraphs, say that it is not true, as alleged therein, that persons claiming rights in the Cherokee Nation by intermarriage have never been recognized by the Cherokee authorities as having any right to share in the property of the Cherokee Nation, except as therein mentioned in paragraph 14. They deny that the uniform construction given the laws in intermarriage of white men and foreigners by the Council and Courts of the Nation has been that such persons acquired only the right to reside in the Nation, and no other rights in the Nation, except such as are civil, political and personal as subjects of the Cherokee Nation, without acquiring any right or title to the Cherokee domain.

Eighth. Further answering, defendants allege that the persons who are citizens by intermarriage in the Cherokee Nation, have at all times owned and controlled farms and improvements the same as citizens by blood of the Cherokee Nation; that their lands and property have descended to their children under the laws of descent and distribution of the Cherokee Nation; that their estates have
16 been administered by the Cherokee Courts; that they have sued and been sued in the Courts of the Cherokee Nation; have been tried for criminal offences in such Nation, and have been acquitted, or convicted, and suffered the punishment as the result of the trials in such Courts warranted.

Ninth. Defendants further allege that the first Act regulating intermarriages with white people of the Cherokee Nation was enacted on the.....day of.....1855, and is as follows:

"AN ACT

"Regulating Intermarriages With White Men.

"Whereas, The peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this Nation; therefore,

"Be It Enacted by the National Council, That any 'unmarried' white man desiring to marry a Cherokee woman, shall be and is hereby required to obtain a license for the same from any of the Clerks of the District Courts of the several districts.

"Be It Further Enacted, That before any license as provided above shall be issued, the person applying shall be and is hereby required to pay to the clerk to whom application is made the sum of five dollars, and be also required to take the following oath: 'I do solemnly swear that I will honor, defend, and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States government or its judicial tribunals any protection, privileges, or redress, incompatible with the same as guaranteed to the Cherokee Nation by the United States, in treaty stipulations entered into between them.

"Be It Further Enacted, That all white men applying for license, as provided in the first section of this act, shall, before ob-
17 taining the same, be required to present to the said clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

"Be It Further Enacted, That all judges of this Nation and every regular minister of all evengelical denominations having the care of souls, are hereby authorized and empowered to solemnize the rites of matrimony, according to the ceremonies usually observed and performed in such cases, under the provisions of this act.

"Be It Further Enacted, That no marriage between a citizen of the United States and a female citizen of this Nation, entered into within the limits of this Nation, except as hereinbefore authorized and provided, shall be legal; and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before any district court of this Nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be entitled for his services to twenty per cent. of the amount collected, and who shall place the remainder in the hands of the National Treasurer for public benefit.

"Be It Further Enacted, That persons performing the marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to the back of the license, which shall be returned. The holder of the license and certificate shall then place the same in the hands of the clerk of the District Court, whose duty it shall be to record the same in his office.

"*Be It Further Enacted,* That any white citizen of the Cherokee Nation by marriage, etc., who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, shall forfeit his right to citizenship to the same, and
18 be subject to be dealt with as other white intruders in the country, and shall be removed out of the Nation.

"*Be It Further Enacted,* That should any white man or woman become a citizen of the Cherokee Nation by marriage, and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widower or widow shall continue to enjoy Cherokee privileges, unless such white widow or widower shall marry a white man or woman (as the case may be); then, in that case, all of his or her right to Cherokee citizenship shall cease.

"*Be It Further Enacted,* That any white man who shall lawfully marry under the provisions of this act, and then, or afterwards, abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation, but shall be, and is hereby considered, and shall be removed as an intruder."

Defendants aver that the foregoing remained the law of the Cherokee Nation until the — day of —, when the following amendment was enacted amending the last paragraph of the foregoing law:

"SEC. 75. Every person who shall lawfully marry under the provisions of this act, and afterwards abandon his wife, shall thereby forfeit every right and privilege of citizenship of this Nation, and shall be considered, and removed from the Nation, as an intruder; *provided,* that every adopted citizen under the provisions of this act, shall have been a *bona fide* resident of the Nation for six months previous to his admission to the polls as a legal voter; and every such adopted citizen who shall be guilty of denying or resisting the jurisdiction of this Nation, or shall appeal to or claim that of any other government, shall be adjudged guilty of perjury, and be liable to all the pains and penalties prescribed in such cases; *provided, also,* that the rights and privileges herein conferred, shall not extend to right of soil
19 or interest in the vested funds of this Nation, unless such adopted citizens shall pay into the general fund of the National Treasury, a sum of money to be ascertained and fixed by the National Council equal to the *pro rata* share of each native Cherokee, in the lands and vested wealth of the Nation, estimated at five hundred dollars, and thereafter conform to the constitution of the Nation, and to the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to the rights of all other Cherokees."

November 28th, 1878, the latter part of this section was repealed, that is all after the words "this Nation" and beginning with the word "unless." This section then stood that way until December 10, 1880, when it was amended and re-enacted to read as follows:

"SEC. 667. Every person who shall lawfully marry under the pro-

visions of this act, and afterwards abandon his wife, shall thereby forfeit every right and privilege of citizenship of this Nation."

And this has remained the law of the Cherokee Nation from that time until this day.

Defendants further allege that the provision set forth in paragraph twelve of the petition, which is as follows: "Provided, also, that the rights and privileges herein conferred shall not extend to rights of soil or interest in vested funds of this Nation," was the law of the Cherokee Nation, only from the 28th day of November, 1878, until December 10, 1880. The law as it has existed since that time and up to the 16th day of December, 1895, being found in the last compilation of the Cherokee laws, to-wit, the Edition of 1892, page 329, Article 16, Section- 659 to 669 inclusive, to which reference is here made.

Tenth. Your petitioners aver that on December 16, 1895, the following act was passed by the Council of the Cherokee Nation:

"COUNCIL BILL NO. 25.

"*An Act in Regard to Marriage of White Men and Foreigners.*

"*Be It Enacted by the National Council:* That from and after the passage of this Act, all non-citizens who may marry Cherokees by blood, Delawares or Shawnees by blood, citizens of the Cherokee Nation, shall acquire by such marriage no rights of property, lands or money belonging in common to the Cherokee people, or the Cherokee Nation, and Chapter XII, Article XVI, Sections 659 to 669, inclusive, pages 329 to 334 of the Compiled Laws of the Cherokee Nation, is hereby so amended as to conform to the provisions of this Act, and to vest no other than political rights in persons not of Cherokee, Delaware or Shawnee blood, who marry Cherokees by blood, or Delawares, or Shawnees, by blood, who are recognized citizens, and all laws or parts of laws conflicting herewith are hereby repealed."

"Passed the Council December 5th, 1895.

"JOHN W. SHARP,
Speaker of Council.

"JOHN R. LEACH,
Clerk of Council.

"Passed the Senate December 6th, 1895.

"SAMUEL SMITH,
President of Senate.

"BROWN HITCHCOCK,
Clerk of the Senate.

"Approved December 16th, 1895.

"S. H. MAYES,
Principal Chief, C. N."

Your petitioners aver that the said Act is a distinct legis-
21 lative construction of their rights and a recognition that all intermarried citizens who were married in accordance with the laws of the Cherokee Nation previously were entitled to share in the common property and funds of the Cherokee Nation the same as citizens by blood.

Eleventh: The defendants for further answer, say that by the Act of Congress of June 28, 1898, entitled, "An Act for the protection of the people of the Indian Territory, and for other purposes," (30 Stat., page 495) and by section 21 thereof, Congress confirmed the roll of Cherokee citizens of 1880, and directed the Commission to the Five Civilized Tribes to enroll all the citizens found living whose names were found on said roll "with such intermarried white persons as may be entitled to citizenship under the Cherokee laws."

Defendants further allege that by an Act of July 1, 1902 (32 Stat. 716-720) section 27, provided that the rolls of the Cherokee Nation should in all respects be made in strict compliance with the provisions of section 21 of the aforesaid Act of June 28, 1898, which said Act of Congress was duly ratified by the Cherokee people as provided in Section 75 thereof.

Defendants aver that the Cherokee Nation, in making said rolls of 1880, enrolled the intermarried white persons along with the citizens by blood, and that the confirmation of said roll gave to all intermarried citizens now living who had their names on such roll the same rights as Cherokee citizens by blood, and the further provision for enrolling all others intermarried since under the same laws under which they were intermarried placed the latter on the same footing and gives to them all alike the same rights to the common property and funds of the Cherokee Nation as citizens by blood.

Wherefore these defendants pray judgment that the peti-
22 tion be dismissed with their reasonable costs and expenses herein incurred.

WILLIAM T. HUTCHINGS,
Attorney for Respondents.

Muskogee, Indian Territory.

UNITED STATES OF AMERICA,
Indian Territory, Western District:

Personally appeared before me W. E. Rowsey, and being sworn, deposes and says:

That he is an intermarried citizen of the Cherokee Nation and one of the defendants herein mentioned among a large number of other citizens of the Cherokee Nation by intermarriage, including those whose names are set out in the above answer; and states that he is familiar with the allegations contained in the foregoing answer, and that the said allegations are true to the best of his knowledge and belief.

W. E. ROWSEY.

Subscribed and sworn to before me on this ninth day of June, 1903, at the town of Muskogee, Indian Territory.

CHAS. W. WESTERHEIDE,
Notary Public.

My commission expires June 3, 1907.

23 Departmental No. 76.

IN THE MATTER OF THE ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE
vs.
UNITED STATES.

III.—*Intervening Petition of the Cherokee Nation—Filed by leave of Court October 7, 1904.*

To the Honorable The Chief Justice and Associate Justices of the Court of Claims of the United States:

Comes the Cherokee Nation by its Principal Chief, William C. Rogers, represented by its attorney in fact, L. F. Parker, Jr., and asks leave to intervene in this cause and respectfully shows to this Court:

First: As the representative and having in its charge the
24 interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them it is directly interested in this cause.

Second: The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States.

Third: That under and by virtue of the provisions of certain acts of Congress and of the treaties between the United States and the Cherokee Nation of Indians, and the patent by the United States to the Cherokee Nation issued on the 31st day of December, 1838, as supplemented and interpreted by the treaty between the same parties on August 17th, 1846, the people of the Cherokee Nation of Indians became and are possessed and now own the lands embraced within the boundaries of the Cherokee Nation, Indian Territory, for the common use and benefit of themselves, their heirs and successors; and that each and every Cherokee has an equal interest therein.

Fourth: That said Cherokee Nation as a body politic possessed and under the provisions of the treaties aforesaid was guaranteed the right of local self government, with full authority to make and carry into effect all such laws as it might deem necessary for the government and protection of persons and property within its jurisdiction, belonging to its own people or such persons as might be associated or connected with them.

25 Fifth: In the exercise of this governmental power the people of the Cherokee Nation ordained and established a written constitution and system or code of laws.

Sixth: That prior to 1855, certain white persons had intermarried with Cherokees, and such marriages while recognized as binding, had given rise to serious questions respecting the status of such intermarried white persons and the jurisdiction of the Cherokee Nation over them.

Thereupon the Cherokee National Council, with the approval of the Principal Chief, passed the following Act:

"AN ACT

"Regulating Intermarriages with White Men.

"Whereas, The peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this Nation: Therefore,

"Be It Enacted by the National Council, That any 'unmarried' white man desiring to marry a Cherokee woman, shall be and is hereby required to obtain a license for the same from any of the clerks of the District Courts of the several districts.

"Be It Further Enacted, That before any license as provided above shall be issued, the person applying shall be and is hereby required to pay to the clerk to whom application is made the sum of five dollars, and be also required to take the following oath:

'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States government or its judicial tribunals and protection, privileges or redress, incompatible with the same as guaranteed to the Cherokee Nation by the United States, in treaty stipulations entered into between them.'

26 *"Be It Further Enacted,* That all white men applying for license, as provided in the first section of this act, shall before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

"Be It Further Enacted, That all judges of this Nation, and every regular minister of all evangelical denominations having the care of souls, are hereby authorized and empowered to solemnize the rites of matrimony, according to the ceremonies usually observed and performed in such cases, under the provisions of this act.

"Be It Further Enacted, That no marriage between a citizen of the United States and a female citizen of this Nation, entered into within the limits of this Nation, except as hereinbefore authorized and provided, shall be legal: and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before any District Court of this Nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be

entitled for his services to twenty per cent. of the amount collected, and who shall place the remainder in the hands of the National Treasurer for public benefit.

"*Be It Further Enacted*, That persons performing the marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to the back of the license, which shall be returned. The holder of the license and certificate shall then place the same in the hands of the clerk of the District Court, whose duty it shall be to record the same in his office.

"*Be It Further Enacted*, That any white citizen of the Cherokee Nation by marriage, etc., who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, shall forfeit his right of citizenship to the same, and be subject to be dealt with as other white intruders in the country, and shall be removed out of this Nation.

27 "*Be It Further Enacted*, That should any white man or woman become a citizen of the Cherokee Nation by marriage, and be left a widow or widower by the deceased of the Cherokee wife or husband, such survivingg widower or widow shall continue to enjoy Cherokee privileges, unless such white widower or widow shall marry a white man or woman (as the case may be); then, in that case, all of his or her right to Cherokee citizenship shall cease.

"*Be It Further Enacted*. That any white man who shall lawfully marry under the provisions of this act, and then, or afterwards, abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation, but shall be and is hereby considered, and shall be removed as, an intruder." Oct. 15, 1855.

Seventh: In pursuance of this policy, and as one of the essentials of an effective government the Cherokee Nation continued to exercise political control over such persons, exacting allegiance of them as citizens of the body politic, subject to its government, and extending to them as a correlative civil, political and personal rights; which included the right to vote and participate in the affairs of the Nation, (with few exceptions), to reside within its limits, to trade, and use the public domain.

Eighth: The Cherokee National Council, with the approval of the Principal Chief, on December 5th, 1874, adopted a new code, the preparation of which had been theretofore duly authorized, and which contained among others the following act:

"ART XV.

"*Intermarriage of White Men and Foreigners.*

"SEC. 67. Whereas the peace and prosperity of the
28 Cherokee people require that, in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within

the territorial limits of this Nation, therefore, every white man, or citizen of the United States, or of any foreign state or government, desiring to marry a Cherokee woman, a citizen of the Nation, shall be and is hereby required to obtain a license for the same from any of the district clerks of the several districts, and make oath or satisfactory showing to such clerk, that he has not a surviving wife from whom he has not been lawfully divorced. And, unless such information be freely furnished to the satisfaction of the clerk, no license shall issue.

"SEC. 68. Every white man or person applying for license, as provided in the preceding section of this act, shall, before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least ten (10) respectable Cherokee citizens by blood, who shall have been acquainted with him at least six months immediately preceding the signing of such certificate.

"SEC. 69. Before any license as herein provided shall be issued, the person applying shall be and is hereby required to pay to the clerk to whom application is made the sum of five dollars, and be also required to take the following oath:

'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States or any other government or from the judicial tribunals thereof, any protection, privilege or redress, incompatible with the same as guaranteed to the Cherokee Nation by the United States, in treaty stipulations entered into between them. So help me God.'

"SEC. 70. Marriages, contracted under the provisions of this act, shall be solemnized as provided by the laws of this Nation, or otherwise shall be null and void.

SEC. 71. No marriage between a citizen of the United States or any foreign nation and a female citizen of this Nation, en-
29 tered into within the limits of this Nation, except as hereinbefore authorized and provided, shall be legal; and any person who shall engage or assist in solemnizing any such marriage shall, upon conviction before any District Court of this Nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such person may reside to collect the same; and such solicitor so collecting shall be entitled for his services to twenty-five per cent. of the amount collected, and shall place the remainder into the hands of the treasurer, to be by him credited to the general fund.

"SEC. 72. Every person performing the marriage ceremony under the authority of a license, provided herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in whose behalf it was issued, who shall within thirty days therefrom place the same in the hands of the district clerk, whose duty it shall be to record the same and return it to the owner.

"SEC. 73. Every adopted citizen of the Cherokee Nation, by marriage or otherwise, who shall use the intercourse law or laws (as they

are termed) in the prosecution of a Cherokee Indian, for any crimi
nal offense committed within the limits of the Cherokee Nation
shall forfeit his rights of citizenship to the same, and be subject t
be dealt with as other intruders in the country, and shall be remove
out of this Nation.

SEC. 74. Should any man or woman, a citizen of the Unite
States or of any foreign country, become a citizen of the Cheroke
Nation by intermarriage, and be left a widow or widower by the de
cease of the Cherokee wife or husband, such surviving widow o
widower shall continue to enjoy the rights of citizenship, unless h
or she shall marry a white man or woman, or person (as the case ma
be), having no rights of Cherokee citizenship by blood; in that cas
all of his or her rights acquired under the provisions of this act shal
cease.

SEC. 75. Every person who shall lawfully marry unde
30 the provisions of this act, and afterwards abandon his wife
shall thereby forfeit every right and privilege of citizenshi
of this Nation, and shall be considered, and removed from the Natio
as an intruder; provided, that every adopted citizen under the pro
visions of this act, shall have been a "bona fide" resident of th
Nation for six months previous to his admission to the polls as a lega
voter; and every such adopted citizen who shall be guilty of denyin
or resisting the jurisdiction of this Nation, or shall appeal to or clai
that of any other government, shall be adjudged guilty of perjur
and be liable to all pains and penalties prescribed in such cases
provided, also, that the rights and privileges herein conferred, shal
not extend to right of soil or interest in the vested funds of this Na
tion, unless such adopted citizen shall pay into the general funds o
the national treasury a sum of money to be ascertained and fixed b
the National Council, equal to the "pro rata" share of each nativ
Cherokee, in the lands and vested wealth of the Nation, estimate
at five hundred dollars, and thereafter conform to the constitution o
the Nation, and to the laws made or to be made in pursuance thereof
in which case he shall be deemed a Cherokee to all intent, and b
entitled to all the rights of other Cherokees

"SEC. 76. Property of every description, possessed within th
limits of the Cherokee Nation, by an adopted citizen, shall, in cas
such adopted citizen abandon his wife without lawful cause, be th
absolute property of such wife, or wife and her children. But when
ever such abandonment shall be planned or effected by the wife, fo
the purpose of ridding herself of her husband, then and in that case
such wife shall be entitled to only such property as shall be awarded—
upon application of either party for divorce—by the court having
jurisdiction."

Ninth: That the National Council, with the approval of the Prin
cipal Chief on the 28th of November, 1877, passed the following act

"*Be It Enacted by the National Council*, That Chapter 13, Arti
cle 15, Section 75 of the New Code laws be, and the same i
31 hereby amended as to strike out of said Section in the las

proviso from the words 'this Nation,' where said words end the third line in said proviso of said Section 75."

So that said proviso after this amendment read as follows:

'provided, also, that the rights and privileges herein conferred, shall not extend to right of soil or interest in the vested funds of this Nation.'"

Tenth: That the National Council, with the approval of the Principal Chief, on the 11th day of December, 1880, passed the following acts:

Be It Enacted by the National Council, That Article 15, Sections 68 and 69 of the New Code of laws be amended so as to read: 'Ten respectable citizens of the Cherokee Nation who are Cherokees, Delawares or Shawnees by blood, be authorized to sign a certificate of moral character of any white man or foreigner desiring a license to marry a Cherokee, Delaware or Shawnee woman.'"

"Be It Further Enacted, That all citizens of the United States and foreigners obtaining a license to marry a Cherokee, Delaware or Shawnee woman under the provisions of Section 69, Article 15, New Code, be required to pay to the district clerk the additional sum of $5.00 to be turned over to the National Treasurer for the benefit of the Cherokee Nation on the first Monday in November of each year, beginning with 1881.

"Tahlequah, C. N., December 10, 1880."

Concurred in by the Senate with the following amendments:

Be It Further Enacted, That all United States citizens or foreigners desirous of marrying a Cherokee, Delaware or Shawnee woman citizen of this Nation, shall on application for marriage licenses present to the clerk of the district in which he is desirous of marrying, a certificate of good moral character, signed by the county clerk,
32 and sealed with the seal of the county of which he is a legal voter.

"Amendment concurred in by Council, December 11th, 1880.

"Approved, December 11th, 1880.

"D. A. BUSHYHEAD,
"Principal Chief of the Cherokee Nation."

Eleventh: That the Cherokee National Council, with the approval of the Principal Chief, on December 6th, 1890, passed the following Act:

An Act giving the circuit courts authority to declare the forfeiture of the rights of certain adopted citizens.

"Be It Enacted by the National Council, That the circuit courts shall have authority to hear and determine all cases that may be brought before it by the solicitors of the several districts, or other persons wherein it may be alleged that any citizen of the United States or other government, adopted by intermarriage under the laws of the Cherokee Nation, has forfeited the rights of citizenship, by

acts which declare such forfeiture. Proceedings in such cases shall be by citation if the party be resident in the Cherokee Nation, or by thirty days notice of such proceedings in the Cherokee Advocate and be conducted as are civil suits before such courts. On the finding of verdict by the jury against such person, it shall be the duty of the clerk of the court to notify the Principal Chief of such finding, and it shall be the duty of the Principal Chief to make known such finding to, and call on, the United States Indian Agent for the removal of such person beyond the limits of the Cherokee Nation. It shall not be lawful thereafter for any clerk to issue a marriage license, or permit to reside in the Cherokee Nation, in any capacity whatever, to any person so declared to have forfeited his rights to citizenship in the Cherokee Nation."

Twelfth: Said original act regulating the intermarriage of
33 white men as amended by these subsequent acts is as follows:

"SEC. 67. Whereas the peace and prosperity of the Cherokee people require that, in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this Nation, therefore, every white man, or citizen of the United States, or of any foreign state or government, desiring to marry a Cherokee woman, a citizen of the Nation, shall be and is hereby required to obtain a license for the same from any of the district clerks of the several districts, and make oath or satisfactory showing to such clerk, that he has not a surviving wife from whom he has not been lawfully divorced. And, unless such information be freely furnished to the satisfaction of the clerk, no license shall issue.

"SEC. 68. Every white man or person applying for license, as provided in the preceding section of this act, shall, before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least ten (10) respectable Cherokee citizens by blood, who shall have been acquainted with him at least six months immediately preceding the signing of such certificate; provided, ten (10) respectable citizens of the Cherokee Nation who are Cherokees, Delawares and Shawnees by blood, be authorized to sign a certificate of moral character of any white man or foreigner desiring a license to marry a Cherokee, Delaware or Shawnee woman.

"SEC. 69. Before any license as herein provided shall be issued, the person applying shall be and is hereby required to pay to the clerk to whom application is made the sum of five dollars, and be also required to take the following oath:

'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States or any other government or from the judicial tribunals thereof, any protection, privilege or redress, incompatible with the same as guaranteed to the Cherokee
34 Nation by the United States, in treaty stipulations entered into between them. So help me God.'

"*Be It Further Enacted,* That all citizens of the United States

and foreigners showing a license to marry a Cherokee, Delaware or Shawnee woman be required to pay to the district clerk additional the sum of $5.00 to be turned over to the National Treasurer for the benefit of the Cherokee Nation on the first Monday in November of each year beginning with 1881.

"*Be It Further Enacted*, That all United States citizens or foreigners desirous of marrying a Cherokee, Delaware or Shawnee woman citizen of this Nation, shall, on application for marriage licenses present to the clerk of the district in which he is desirous of marrying a certificate of good moral character signed by the county clerk and sealed with the seal of the county of which he is a legal voter.

"SEC. 70. Marriages, contracted under the provisions of this act, shall be solemnized as provided by the laws of this Nation, or otherwise shall be null and void.

"SEC. 71. No marriage between a citizen of the United States or any foreign nation and a female citizen of this Nation, entered into within the limits of this Nation, except as hereinbefore authorized and provided, shall be legal; and any person who shall engage or assist in solemnizing any such marriage shall, upon conviction before any District Court of this Nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such person may reside to collect the same; and such solicitor so collecting shall be entitled for his services to twenty-five per cent. of the amount collected, and shall place the remainder into the hands of the treasurer, to be by him credited to the general fund.

"SEC. 72. Every person performing the marriage ceremony under the authority of a license, provided herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in whose behalf it was issued, who shall within thirty days therefrom place the same in the hands of the district clerk, whose duty it shall be to record the same and return it to the owner.

"SEC. 73. Every adopted citizen of the Cherokee Nation, by marriage or otherwise, who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, shall forfeit his rights of citizenship to the same, and be subject to be dealt with as other intruders in the country, and shall be removed out of this Nation.

SEC. 74. Should any man or woman, a citizen of the United States or of any foreign country, become a citizen of the Cherokee Nation by intermarriage, and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widow or widower shall continue to enjoy the right of citizenship, unless he or she shall marry a white man or woman, or person (as the case may be), having no rights of Cherokee citizenship by blood; in that case all of his or her rights acquired under the provisions of this act shall cease.

SEC. 75. Every person who shall lawfully marry under the pro-

visions of this act, and afterwards abandon his wife, shall thereby forfeit every right and privilege of citizenship of this Nation, and shall be considered, and removed from the Nation as an intruder; provided, that every adopted citizen under the provisions of this act, shall have been a "bona fide" resident of the Nation for six months previous to his admission to the polls as a legal voter; and every such adopted citizen who shall be guilty of denying or resisting the jurisdiction of this Nation, or shall appeal to or claim that of any other government, shall be adjudged guilty of perjury and be liable to all pains and penalties prescribed in such cases; provided, also, that the rights and privileges herein conferred, shall not extend to right of soil or interest in the vested funds of this Nation.

"SEC. 76. Property of every description, possessed within the limits of the Cherokee Nation, by an adopted citizen, shall, in case such adopted citizen abandon his wife without lawful cause, be the absolute property of such wife, or wife and her children. But
36 whenever such abandonment shall be planned or effected by the wife, for the purpose of ridding herself of her husband, then and in that case, such wife shall be entitled to only such property as shall be awarded—upon application of either party for divorce—by the court having jurisdiction.

"*Be It Enacted by the National Council,* That the circuit courts shall have authority to hear and determine all cases that may be brought before it by the solicitors of the several districts, or other persons wherein it may be alleged that any citizen of the United States or other government, adopted by intermarriage under the laws of the Cherokee Nation, has forfeited the rights of citizenship, by acts which declare such forfeiture. Proceedings in such cases shall be by citation if the party be resident in the Cherokee Nation, or by thirty days' notice of such proceedings in the Cherokee Advocate and be conducted as are civil suits before such courts. On the finding of verdict by the jury against such person, it shall be the duty of the clerk of the court to notify the Principal Chief of such finding, and it shall be the duty of the Principal Chief to make known such finding to, and call on, the United States Indian Agent for the removal of such person beyond the limits of the Cherokee Nation. It shall not be lawful thereafter for any clerk to issue a marriage license, or permit to reside in the Cherokee Nation, in any capacity whatever, to any person so declared to have forfeited his rights to citizenship in the Cherokee Nation."

Thirteenth: Intervener further alleges that said act as last above set out was in force on said 11th day of December, 1880, and has at all times since that date been the law of the Cherokee Nation upon the subject of intermarriage of white persons therein, and is in force in that Nation to this day.

Fourteenth: The intervener further alleges that during the time the act as contained in the new code of 1875 was in force,
37 and until the same was further amended on the 28th day of November, 1877, but two intermarried white persons availed

themselves of the offer therein made, by which persons of that class might acquire by purchase, a right in the common property of the Cherokee people the same as native born Cherokees, and that neither of said citizens are parties to this suit, nor are their rights involved or affected hereby; and that no party to this suit or persons whose rights are affected hereby has ever purchased any right in the lands or funds of the Cherokee people nor have they ever paid or offered to pay any consideration therefor.

Fifteenth: The Intervener further alleges that on the 19th day of July, 1866, a treaty was entered into between the United States and the Cherokee Nation of Indians containing among other provisions the following:

"Art. 15. The United States may settle any civilized Indians friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees on such terms as may be agreed upon by such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz:

"Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever remain a part of the Cherokee Nation, on equal terms in every respect with native citizens.

38 "And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their *their* tribal laws, customs and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

"And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. * * *"

Sixteenth: The Intervener further alleges in pursuance of said treaty on the 8th day of April, 1867, articles of agreement were made between the Cherokee Nation of Indians, and the Delaware tribe of Indians, which contained among others the following provisions:

"Whereas by the fifteenth article of a certain treaty between the United States and the Cherokee Nation, ratified August 11th, 1866, * * *

"Now therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

The Cherokee parties of the first part, for and in consideration of certain payments and the fulfillment of certain conditions hereinafter mentioned agree to sell to the Delawares for their occupancy a quantity of land * * nor shall the continued ownership and occupancy of said land by any Delaware so registered be in-
39 terfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the native citizens thereof. * * * "

"On the fulfillment of the Delawares of the foregoing stipulations all the members of the tribe registered as above provided shall become members of the Cherokee Nation with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided. And the children born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees."

Seventeenth: The Intervener further alleges that on the 7th day of June, 1869, articles of agreement were entered into between the Cherokee Indians and the Shawnee tribe of Indians, which among other provisions contained the following:

"* * Whereas it is provided by the 15th Article of the treaty between the United States and the Cherokee Indians concluded July 19th, 1866, that the United States may settle any civilized Indians. * *"

"And it is further agreed by the parties hereto that in consideration of the said payments and acts agreed upon as hereinbefore stated, that the said Cherokee Nation will receive the said Shawnees * * into the country of the said Cherokees upon unoccupied lands east of 96 degrees, and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect and with all the privileges and immunities of the native Cherokees of said Cherokee Nation; * *"

Eighteenth: That the National Council in the exercise of its power to construe treaty stipulations on the 27th day of April, 1886, passed the following act:

40 *"Construction of the rights of Cherokee citizenship as designed to be conferred upon freedmen and civilized Indians by the 9th and 15th articles of the treaty of 1866.*

"Whereas, Section 20 of the Article of the Cherokee Constitution vests the sole power of the construing treaty stipulations in the National Council, acting in behalf of this Nation as one of the parties to any treaty, and

"Whereas, pursuant *of* this 'power' the National Council did on the 20th day of November, 1866, construe certain provisions of the treaty of 1866, relating to free colored persons and freedmen formerly slaves of Cherokee citizens, and contained in the 9th article of said treaty as well as relating to civilized Indians who might be settled east of 96 degrees, of west longitude, according to Article 15th of said treaty, declaring such colored persons, freedmen and friendly Indians citizens of this Nation the same as native Cherokee residents and adopted whites, but omitted to define and construe what rights and privileges did attach to such citizenship as then understood and intended to be conferred and vested; and what rights were reserved by the Nation making such grant; therefore,

"*Be It Enacted by the National Council,* That the phrase 'All the rights of native Cherokees,' as used in the 9th and 15th Articles of the treaty of July 19th, 1866, between the United States and this Nation, is hereby construed to mean the individual rights, privileges and benefits enjoyed by white adopted citizens of this Nation, before and at the making of said treaty, and who have been by law admitted to 'All the rights of the native Cherokees'—civil, political and personal, as subjects of the Cherokee Nation of Indians—without acquiring any right or title to the Cherokee domain, or to the proceeds thereof when made subject to a division among those to whom such domain had been conveyed—all the right to the land then held and owned by this Nation, and to the principal of the proceeds thereof when realized, being reserved by and to the original Cherokee owners,

as in the case of adopted white citizens, as aforesaid, subject
41 to be conveyed or granted only at the option of said owners,

or for value received according to the agreements provided to be made with friendly Indians in conformity with the 15th Article of said treaty.

"*Bt It Further Construed and Declared,* That agreeably to such understanding of the 15th Article of said treaty, the value of the lands west of the Arkansas river having not been computed when ascertaining the just proportion of money to be paid by the Delawares and Shawnees when admitted citizens of this Nation—said tribes were when adopted and are now entitled to the above defined civil, political and personal rights of individual citizens as subjects of this government, with such right to the national domain and funds as were by them or either of them paid for as per agreement made in conformity with said 15th Article; and that any just title to Cherokee land west of 96 degrees or to the principal to any of the proceeds thereof, was not by them purchased, nor has been acquired by them since.

"*Be It Further Construed and Declared,* That in pursuance of the aforesaid understanding of this Nation, the free colored persons and freedmen, described in the 9th Article of said treaty, were admitted to, and are now entitled to, those rights of 'Native Cherokees' as had been and were, when the said treaty was made, previously held and enjoyed by native Cherokees and adopted whites who had been given all the rights of native Cherokees as citizens of this government, yet

had been excluded from per capita of money realized by this Nation from the sale of land; the said colored persons and freedmen did not acquire by the use of the phrase, 'All the rights of native Cherokees,' an individual or other title to the Cherokee domain or any part of the same other than the use thereof in common with all other citizens, nor to the benefit of the proceeds thereof except such benefit as was or might be provided to be conferred by investments of such proceeds and expenditures of the interest by the Cherokee Government for the benefit of all citizens alike."

Nineteenth: The National Council without the approval
42 of the Principal Chief on the 19th of May, 1883, passed the following act:

"*An act providing for the payment of the balance due on lands west of 96 degrees per capita.*

"*Be It Enacted by the National Council,* That when the additional amount appropriated by act of Congress of March 3rd, 1883, shall have been received by the treasurer of the Cherokee Nation the Principal Chief shall cause the same to be paid out 'per capita' to the citizens of the Cherokee Nation by Cherokee blood.

"*Be It Further Enacted,* That for the purpose of carrying out the provisions of this Act the Principal Chief shall at his earliest convenience appoint two competent persons in each district to make correct census roll of the persons entitled and turn over the same certified to by him to the treasurer of the Cherokee Nation who shall file the same in the office.

"*Be It Further Enacted,* That the persons appointed by the Principal Chief to take the census shall each be entitled to ($3.00) three dollars a day while in actual service.

"*Be It Further Enacted,* That as soon as advised by the proper authority that the funds are ready it shall be the duty of the treasurer to make requisition for the same and on receiving said funds it shall be his duty to pay the same out per capita to citizens of the Cherokee Nation by blood according to the census rolls. In making said payments the treasurer is hereby directed to pay the funds in person to all adult persons entitled to the same, and to parents, guardians and heads of families representing minors and disabled persons, and to no other person or persons whomever: It shall be the duty of the treasurer to keep a receipt roll of the payments made, and to whom, and which shall be reported to the National Council next following said payment.

"*Be It Further Enacted,* That the sum of three hundred dollars or so much thereof as may be necessary to defray the expenses of taking the census and preparing the proper rolls, is hereby appropriated out of the funds to be received for this purpose.

43 "*Be It Further Enacted,* That the Treasurer shall make the payment at Tahlequah, Vinita, Fort Gibson and Webers Falls.

Twentieth: That the National Council with the approval of the Principal Chief on April 28th, 1886, passed the following Act:

"Whereas, by an act of the National Council approved May 19th, 1883, it was provided that the treasurer, whenever payments are made to him, by said Cherokee Strip Live Stock Association, is hereby requested to retain in the treasury until the same shall amount to $300,000.00 and to pay the same out per capita under the direction of the National Council, and

"Whereas, said amount above specified is now on hand in the treasury, the act provides that it shall be paid out to the citizens of the Cherokee Nation by blood."

And the National Council, with the approval of the Principal Chief, on November 26th, 1890, provided for the distribution of proceeds from leases of lands in the Cherokee Outlet to Cherokees by blood only.

Twenty-first: That the National Council, with the approval of the Principal Chief, passed among others the following acts:

"*Be It Enacted by the National Council,* That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and they are hereby re-admitted into the rights and privileges of citizens of the Cherokee Nation, provided: That the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation.

"Approved November 29th, 1878."

"*Be It Enacted by the National Council,* That David N. Allen, Mary Allen and Joe Allen be and are hereby re-admitted
44 to all the rights and privileges of Cherokee citizens."

Concurred in by Council with following amendment:

"Provided, that David N. Allen, the petitioner, shall not acquire any rights except such as attach to white men, adopted citizens of (the) Cherokee Nation.

"Approved December 3rd, 1878."

"*A bill correcting error in census roll in case of W. D. Clingan.*

"*Be It Enacted by the National Council,* That the Principal Chief be, and he is hereby authorized to have corrected the error in the registration of the name of W. D. Clingan on the authenticated census roll of Cherokee citizens 1880-1. (Said W. D. Clingan being registered on said roll for Cooweescoowee district as an adopted white citizen, whereas the said W. D. Clingan is a well-known and entitled Cherokee citizen by blood and descent, and to be so registered as he has been before and since the year 1880, and the Principal Chief is authorized and directed to make the correction accordingly."

"*Senate Bill No.* 1.

"*Be It Enacted by the National Council,* That Louisa Schoose, formerly Louisa Woodal, together with her children, Lee, Nimrod

and Harry Schoose, be and are hereby admitted to all the rights of native born Cherokees in this Nation.

"*Be It Further Enacted,* That Schoose, husband of Louisa, be and is hereby admitted to citizenship the same as other adopted citizens of this Nation, rights, benefits, etc., such as the law gives adopted citizens, provided said Schoose complies with the law regulating intermarriages with white men.

"November 5th, 1884."

Concurred in by Council with following amendment:

"Insert "readmitted' instead of 'admitted' in line 6."

"November 6th, 1884.

"Amendment concurred in by Senate November 6th, 1884."

45 Twenty-second: The Intervener alleges that by virtue of the legislation hereinbefore recited, and by the laws and customs of the Cherokee Nation, there has been at all times and is now two distinct classes of citizenship in the Cherokee Nation. The one a political citizenship—as a member of the body politic—and the possession of which gave to its members civil, political and personal rights, that is to say, permission to reside and trade therein and participate in the affairs of the Nation, but without any interest in the common property or funds of the tribe. The other, a citizenship or membership in the tribe derived either through Cherokee blood (including a residence within the Nation), or by having acquired an interest in common with native Cherokees in their common property and funds by purchase, or by express grant; and that by the treaties, laws and customs of the Cherokee people, the actions of the National Council and the decisions of the courts for more than eighty years, this distinction has been recognized and enforced.

Twenty-third: The Intervener further alleges that the only persons entitled to the class of citizenship carrying with it an interest in the common property and funds of the Cherokee people were those who had derived such interest by inheritance, by purchase, or by express grant. That white persons, defendants herein, who have intermarried with Cherokees or other Indians who have ac-

46 quired the same rights, have never become entitled to any right or interest in the common property or funds of the Cherokee people either by inheritance, by purchase or by grant. And by the universal customs, treaties and laws of the Cherokee people as construed by the councils and courts, such intermarried white persons acquired by intermarriage only such rights as empower them to participate in the affairs of said Nation, as citizens thereof, that is to say, civil, political and personal rights therein; and according to said treaties laws, universal customs and decisions said white persons who have intermarried with Cherokees have acquired no interest in the common property or funds of the Cherokee people.

Twenty-fourth: The Intervener further states that from time to time funds have accumulated in the treasury of the United States and of the Cherokee Nation belonging to the Cherokee people, dis-

tributions from which funds have been made heretofore by the Cherokee Nation among those entitled thereto.

That for a period of more than forty years, particularly since the passage of the act of 1855, there have been a number of white persons resident in the Cherokee Nation who have intermarried with Cherokees, and that no such intermarried white persons, except those who have acquired such rights by purchase, have ever asserted a claim or set up any right whatever to any share in the com-
47 mon property of the Cherokee people, or to any share in the funds belonging to the Cherokee people, distribution of which has been made, as aforesaid; but on the contrary whenever payments have been made of funds which were the common property of the Cherokee people, such payments have universally been made to those citizens who were either Cherokees by blood, or who had acquired interests the same as native Cherokees in the common property or funds by purchase or express grant; and that the said intermarried white persons have participated in such payments and have received moneys growing out of such payments for and on behalf of different members of their families, who were entitled to the same by reason of their Cherokee blood, by purchase or express grant, without asserting or claiming any right in themselves to said funds or any portion thereof.

Twenty-fifth: The Intervener further alleges the law of the Cherokee Nation permitting suit to be brought against said Nation, which has been in force at all times since the adoption of the new code, November 1st, 1875, is as follows:

"The Cherokee Nation shall be liable to all persons whatever citizens of the Nation, having claims at law or equity, against her to the same extent as individual persons are liable to each other, and may be sued by any citizen, having a cause of action, in the manner hereinafter provided; but no suit shall be maintained unless the claim has been demanded, and payment refused or waived.

"All suits against the Nation shall be commenced in the
48 circuit court of the district in which the national capital is situated; but appeals may be taken to the supreme court in said circuit and supreme courts shall have exclusive jurisdiction over the same manner as in civil cases between individual litigants, and all cases in which the Nation may be made a party defendant; provided, however, that said suits may with the consent of the parties originate in and be determined by the supreme court alone independent of the circuit court. Suits against the Nation shall be instituted and conducted in the same manner as suits between individuals.

"Process in suits against the Nation shall be served on the Principal Chief, in the mode prescribed by law for the service of process in other cases; and the Principal Chief shall, whenever such process against the Nation is served upon him, appear in person or by counsel, and represent the Nation. He shall employ counsel as he may deem necessary to appear in defense of the Nation.

"Judgments and decrees against the Nation shall not be enforced

in any manner, except by an appropriation made by the National Council, or the petition of the person holding such judgment or decree, accompanied by a duly certified copy of such judgment or decree."

That no action at law or suit in equity was ever brought against the Cherokee Nation by or on behalf of any intermarried white person asserting any claim to a distributive share or interest in said funds or any part thereof.

Twenty-sixth: The Intervener further states that when in the treaties and laws the word "citizen" is used, the question as to what class of citizens is referred to is, as in other statutes and treaties controlled by the context, that is to say, by the connection in which said word is used. Where the word "citizen" is used in
49 treaties or legislation having reference to political or governmental affairs, such word has always been construed to mean and include all persons who are and were citizens of the body politic participating in its affairs and subject to its control; and where the word "citizen" has been used in legislation or treaties affecting the vested estate and funds of the Cherokees such term has always been construed as apply- only to that class of citizens which has an interest in the common property of the Cherokee people.

Twenty-seventh: The Intervener further alleges that the construction of the laws hereinbefore set out, namely, that white persons who have intermarried with Cherokees or other Indians who have acquired the same rights, are not entitled to participate in the common property of the Nation has been approved and acquiesced in not only by the Cherokee Nation, by the people of the Nation, by the said white intermarried citizens themselves, but also been repeatedly and continuously recognized by the Department of the United States Government having in charge the affairs of the Indians.

Twenty-eighth: The Intervener further alleges that the sole aim and intent of the legislation of Congress respecting this subject, has been to allot this estate among the Indians to whom it belonged; that the United States through such legislation or otherwise has never intended or attempted to create, add to, change, modify or in
50 any way affect the rights of the persons interested in said estate; but on the contrary the whole course and purpose of legislation has been to provide a means by which the *the* property might be partitioned among those actually entitled thereto. The acts of Congress of July 28th, 1898, and of July 1st, 1902, when understood and properly construed evince no other purpose or intent, and did not attempt or intend to create new interests or rights of property, or affect those already vested.

Twenty-ninth: The Intervener further alleges the roll of 1880 referred to in the act of Congress of June 28th, 1898, was not intended to be, nor was it a roll of citizens who were entitled to participate in the distribution of the lands and moneys of the tribe, but was a census of the Cherokee Nation taken in obedience to the constitution of said Nation to ascertain and fix the basis of representation in

the National Council. The second and fourth sections of the act are as follows:

"An Act for taking a census of the Cherokee Nation for the year 1880.

SEC. 1. *Be It Enacted by the National Council,* * * *

"SEC. 2. That it shall be the duty of the said census takers to take a full and complete returns of all persons found residing or sojourning within the limits of the respective districts, at the time of making the enumeration, as required by the foregoing section. And said returns shall show the names of all heads of families, giving a complete registration of births, deaths and marriages; also the age and sex; the names of all males above the age of eighteen
51 years; the names of all females above the age of eighteen; the names of all males under the age of eighteen years; the name of all females under the age of eighteen years, the names, sex and ages of all orphans under sixteen years; the names of all whites entitled by law, to citizenship, within the ages above specified; the names of all whites not so entitled; the names of all colored persons entitled by law to citizenship, within said ages, and the names of all such persons not so entitled; and the names of all Indians not so entitled, also a report of the chief production of agriculture, including number of horses, cattle, hogs, sheep, etc., during the year ending May first, 1880. * *

"SEC. 4. That it shall be the duty of the Principal Chief to cause a summary of the returns of said census to be prepared and laid before the National Council, together with the full returns of the same, at the beginning of the annual session thereof in 1880. And which returns shall serve as a basis for the representation of the several districts of the Cherokee Nation, in the National Council in accordance with the amendment to the constitution dated November 21, 1866. * * *"

The first and second sections of the act adopting said census roll are as follows:

"SEC. 1. *Be It Enacted by the National Council,* That the register or schedule of citizens of the Cherokee Nation, submitted to the Principal Chief by the census takers of the year 1880 under requirement of the act providing for taking the census of the Cherokee Nation,—as the said register or "schedule" has been examined, revised and amended by the committees of the present National Council, duly appointed for the purpose, and by them submitted to, and accepted by the Council, is hereby approved as a true and correct list of persons acknowledged and recognized to be citizens of the Cherokee Nation, at and within the time the said census was authorized to be taken.

"SEC. 2. *Be It Further Enacted,* That there shall be made in fair and legible hand writing, and under the supervision of the Principal Chief, as a neat and complete alphabetical transcript, or copy of all

names of citizens and non-citizens, to be found in the census
52 returns, revised and amended as before mentioned, with such discriptive matters and things as are attached to each name. * * "

That as incidental to and as a part of a proper census this roll contained discriptive matters and things disclosing how each person became and was a member of the body politic—the Cherokee Nation—and that said discriptive matters and things appended to each name thereon when taken in connection with the laws and customs of the Cherokee people determined to which of the classes of citizens, hereinbefore referred to, each belonged; that is to say, whether they were Cherokees by blood, Delawares or Shawnees who had rights in the common property and funds of the tribe as well as political rights in the Nation; as to the other persons whose names appeared upon said roll, such discriptive matters and things attached to their names when considered in connection with the laws and customs of the Cherokee people, disclosed that such other persons were merely citizens and members of th body politic with certain political rights as herein alleged, and that such other persons were not citizens possessing the rights of native Cherokees, and that such other persons did not have and were not entitled to have, any interest in the common property or funds.

That the adoption and confirmation of said roll of 1880 by the acts of Congress referred to was not merely an adoption of the list
53 of names shown thereon, but was also the adoption of the discriptive matter and things herein referred to.

That said act of Congress of June 28th, 1898, when properly construed does not require the enrollment by the Commission of any person whose name appears upon said roll of 1880, where the descriptive matters and things appearing thereon showed that such person was not entitled to any part of the common property and funds of the Cherokee people; that it was not intended by said acts of Congress of June 28th, 1898, and of July 1st, 1902, to confer upon the persons whose names appeared upon said roll of 1880 any other or greater rights than the roll itself showed they were entitled to, and that said acts of Congress when properly construed neither required nor permitted said Commission to enroll any person as entitled to share in the common property and funds of the Cherokee people, where it appeared by the descriptive matters and things upon said roll of 1880 that such person was not a native Cherokee, or a person who had acquired the full rights of a native Cherokee by purchase or express grant; and that as to all persons whose names did not appear upon said roll of 1880, said Commission was not required nor permitted to enroll any person as entitled to participate in the allotment of the common property of the Cherokee people who was not either a native Cherokee, or one who had acquired the rights of a native Cherokee by purchase or express grant.

54 That if said Acts of Congress or either of them are construed to authorize said Commission to place upon the roll

of allotment, the names of persons who were not entitled to any interest in the common property and funds of the Cherokee people, such Acts of Congress would operate to deprive the Cherokee people of their property without due process of law, in violation of Article Five Amendments to the Constitution of the United States, and hence in so far as the same sought to confer upon persons not entitled thereto any rights in the common property and funds of the Cherokee people they are unconstitutional and void.

Thirtieth: The Intervener further alleges that neither the Cherokee national government, the Cherokee Indians, or the United States, conjunctively or severally, either between themselves, or by any agreement for or with the intermarried white persons, or otherwise, has granted to or recognized in such persons any right or interest in the lands or moneys belonging to the Cherokee people.

Thirty-first: The Intervener further alleges that the United States, neither by treaty or act of Congress has ever provided for or recognized any right in any intermarried white person in the Cherokee Nation to share in the lands and moneys belonging to the Cherokee people, nor has any attempt been made by the United States to vest such persons with an interest therein, and if attempted it would have been in violation of the rights of said Cherokee people, con-
55 trary to Article Five Amendments to the Constitution of the United States, null and void.

Thirty-second: The Intervener further alleges that the Cherokee National Council has never by any act declared the right in any intermarried white person to share in the common property and funds of the Cherokee people, nor has any attempt been made by said National Council to vest such persons with an interest therein, and had such attempt been made it was unauthorized by the constitution of the Cherokee Nation; or by the people, in violation of their rights, wholly null and void.

PRAYERS.

Wherefore the Intervener prays that this Honorable Court will report its findings and opinions to the Secretary of the Interior as follows:

1. That the lands within the boundaries of the Cherokee Nation, and the funds to the credit of or that may be due that tribe, belong to the Cherokee people.

2. That, under the laws, usages and customs of the Cherokee people, persons not of Cherokee blood have become entitled to the rights of native Cherokees in the common property and funds belonging to the Cherokee people, by purchase, or by express grant, and not otherwise.

3. That white persons intermarried with native Cherokees or others who have acquired the same rights, have never become
56 entitled to any interest in the common property or funds of the Cherokee people by purchase.

4. That the Cherokee people have never by treaty, agreement or otherwise granted to intermarried white persons any right, title or interest in or to their common property or funds.

5. That white persons marrying Cherokees or others who had acquired the same rights, did not by the act of marriage become entitled to a pro rata share, equal with native Cherokees, in the common property and funds of the Cherokee people; but only acquired, by complying with the Cherokee laws respecting intermarriage, civil, political and personal rights in the Cherokee Nation, as a body politic.

6. That the laws of Congress recognize in intermarried white persons those rights and none other to which they are entitled under the laws, usages and customs of the Cherokee people.

7. That these intermarried whites, whose sole claim is based upon an intermarriage with Cherokees by blood or other Indians who have acquired the rights of native Cherokees, are not entitled to be enrolled as having a right to participate in the distribution of the common property and funds of the Cherokee people.

If this Honorable Court shall be of the opinion that the title to this property is in the Cherokee Nation, as such, then the In-
57 tervener respectfully prays the Court to report the following findings:

1. That under the laws, usages and customs of the Cherokee Nation, persons not of Cherokee blood have acquired the rights of native Cherokees in the common property and funds belonging to the Cherokee Nation, by purchase, or by express grant, and not otherwise.

2. That but two intermarried white persons have ever acquired the rights of native Cherokees in the common property and funds of the Cherokee Nation by purchase; and that none of the persons parties to this action, nor others for whom they appear, have ever acquired such interest or any interest therein by purchase.

3. That the Cherokee Nation has never by treaty, agreement or otherwise granted to intermarried white persons any right, title or interest in the common property or funds of the Cherokee Nation, with the two exceptions mentioned.

4. That said white persons marrying Cherokees or others who have acquired the same rights, did not by the act of marriage become entitled to a pro rata share, equal with native Cherokees, in the common property and funds of the Cherokee Nation; but only acquired, by complying with the Cherokee laws respecting intermarriage, civil, political and personal rights in the body politic.

5. That these intermarried whites whose sole claim is
58 based upon an intermarriage with Cherokees, or other Indians who have acquired the rights of native Cherokees, are not entitled to be enrolled as having a right to participate in the distribution of the common property and funds of the Cherokee Nation.

7. Such other and further findings and opinions as in the judgment of this Honorable Court may be just and proper in the premises.

L. F. PARKER, JR.,
Attorney in Fact for the Cherokee Nation.

STATE OF MISSOURI, *City of St. Louis:*

Personally appeared before me William C. Rogers, who being first duly sworn deposes and says:

That he is the duly elected, qualified and acting Principal Chief of the Cherokee Nation; that he has read the foregoing petition, knows the contents thereof and that the allegations therein contained are true to the best of his knowledge and belief.

WILLIAM C. ROGERS.

Subscribed and sworn to before me this 30th day of September, A. D. 1904, at the city of St. Louis, Missouri.

[SEAL.] RICHARD T. BOOTH,
Notary Public.

59 IV.—*Argument and Submission of Case.*

This cause, coming on to be heard upon the petition, answers, agreed facts and proofs, was argued by the attorneys of the respective parties on the 18th and 19th days of January, 1905, and submitted.

60 IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE.
v.
THE UNITED STATES.

V.—*Opinion of the Court. Filed May* 15, 1905.

NOTT, Ch. J., delivered the opinion of the court:

The subject-matter of this suit consists of 4,420,076 acres of land in the Cherokee country about to be allotted in severalty among the Cherokee people entitled to participate in the distribution of the common property of the Cherokee Nation. The case was transmitted to the court by the Secretary of the Interior on the 24th of February, 1903. The Secretary thus states in his letter of transmittal the nature of the controversy:

"A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens, and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood against the enrollment of intermarried persons, 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character.' It is asserted, on the one hand, that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the

distribution of the property of the nation, and, on the other hand, that the Cherokee laws as well as the laws of Congress recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such nation entitled to share equally with full-blooded citizens in the property of the tribe."

Since the case was transmitted and tried Congress has made the following enactment:

"That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, Departmental, numbered seventy-six,' now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of ap-
61 peal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing." (Act 3d March, 1905, 34 Stat. L., p. —.)

Upon the facts presented, and after carefully considering the questions discussed, the court has reached the following conclusions:

1. The constitution and laws of the Cherokee Nation contemplate three classes of citizens: First, those who are Cherokees by blood; second, those who are Cherokees by intermarriage and the payment of $500; third, those who are citizens by intermarriage alone. As to the first class, they are communal owners according to Indian tradition and Indian law; and their citizenship, under the constitution of the Cherokee Nation, is indefeasible save by expatriation and becoming citizens of another power. As to the second class, they possess the political rights of Cherokees by virtue of marriage, and become communal owners of the soil and of the vested funds of the nation by virtue of their payment "into the general fund of the national treasury of a sum of money to be ascertained and fixed by the national council equal to the pro rata share of each native Cherokee in the lands and vested value of the nation, estimated at $500." (Revised Code, 1874, p. 224.) As to the third class, according to special provisions and necessary implication and long-continued usage, "the rights and privileges" of their limited citizenship do not extend to sharing in the communal property of Cherokees by blood or to an interest in the vested funds of the nation.

The constitution of the Cherokee Nation, 1839, relates to Cherokees by blood, to their communal ownership of land and to their citizenship indefeasible save by expatriation (art. 2). The provisions of Cherokee law relating to intermarriage with whites and to citizenship thereby acquired are statutory.

Under the primitive law of the Cherokees, derived from that of the Iroquois, descent was through the mother, and the nation was subdivided into clans or tribes. Within a clan or tribe the members were deemed brothers and sisters and marriage between them unlawful.

Consequently intermarriage could only be between members of one tribe and members of another tribe. Such being the fundamental and moral basis of marriage and descent, it followed that when a man married a woman of another tribe he left his own and became a resident in the tribe of his wife. When she died he might continue, through courtesy, to dwell among and be a member of the tribe. If he afterwards married a woman of another tribe, he went to dwell with her and among her people. He was not excluded or expelled from the tribe of his first wife, but by his second marriage and change of domicile he necessarily withdrew from it. (*Morgan's League of the Iroquois*, pp. 79, 87.))

The law of Indian tribal citizenship or membership was in principle like our own law of domicile—a man does not lose his domicile until he acquires another. When he acquires a new domicile the old one ceases to exist for him. So the Indian widower remained a *quasi* citizen or member of his wife's tribe until he married into another, and then on the acquirement of a new membership in another tribe the old one ceased to be.

If the Indian husband abandoned his wife, abandonment meant withdrawing from her tribe; and again necessarily he ceased
62 to have any right or interest therein for the simple reason that whatever right or interest he had within the tribe was due to his being the actual husband of a daughter of the tribe. The statutes of the Cherokees are but a written codification of the primitive law, somewhat adapted in form to the changed conditions of civilization. But the fundamental, primitive idea runs through them, insistent, constant, that all of the man's rights who marries into the nation are dependent upon and linked to his wife as a daughter of the nation; and when that link is broken, whether by abandonment or by marriage with some woman who is not a daughter of the Cherokee Nation by blood, he thereby drops out of the nation and ceases to be a citizen.

But the fact that there are citizens in the Cherokee country who are communal owners and that there are citizens who are not communal owners presents the question of law whether the lands which form the subject matter of this suit—lands which are to be divided by allotment among the citizens of the Cherokee Nation—are communal property and belong exclusively to one class of citizens, or whether they constitute national property, in which each and every citizen of the nation has an equal interest independently of the character of his citizenship.

2. That all lands of the Cherokees were primarily communal is too well settled to need reiteration. (*Western Cherokees v. United States*, 27 C. Cls. R., 1; *Journeycake v. Cherokee Nation*, 28 *id.*, 281, 303, 305; *Whitmire v. Cherokee Nation*, 30 *id.*, 138, 158.)

That the United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people—sometimes national, sometimes communal—has appeared in many decisions. (*Eastern Cherokees v. United States*, 20 C. Cls. R., 449; *Western*

Cherokees v. Same, 27 *id.,* 1; *Shawnees v. Same,* 28 *id.,* 447; *Delawares v. Cherokee Nation,* 28 *id.,* 281.)

That the intermarried whites are not communal owners except in cases where they paid into the general fund of the national treasury a sum of money equal to the pro rata of each native Cherokee in the lands and vested wealth of the nation is a legal condition which appears clearly in the history and statutes of the nation. The controlling principle has been that the "rights and privileges" acquired by marriage and residence were political rights and privileges, which did "not extend to right of soil or interest in the vested funds of the nation." The right to an estate or interest in the communal property has always had to be paid with a price. In the case of the Delawares they became communal owners by virtue of the treaty, but they also had to pay, first, an amount proportionate to their numbers into the national fund of the Cherokees, and, second, an amount equal to $1 per acre for 160 acres for each individual of the Delaware tribe, analogous to the payment of $500 by an intermarried white who would become a communal owner. In the case of the Freedmen nothing was paid, because their incorporation with the Cherokees as citizens and communal owners was enforced by the United States as a condition to the continued existence of the Cherokee Nation. "At the close of the civil war the Cherokee country was virtually conquered territory, and the Cherokee Nation at the mercy of the United States" (*Whitmire v. Cherokee Nation,* 30 C. Cls. R., 138, 150). The Cherokee Nation had taken sides in the civil war, it had been overthrown when the Confederate States fell, and the will of the conqueror was superior to the constitution and statutes.

63 These facts make a strong case against the intermarried whites, and if they were the only facts probably would be deemed sufficient to establish conclusively the exclusive communal rights of those who are Cherokees by blood.

But in the case of the Delawares (*Cherokee Nation v. Journeycake,* 155 U. S. R., 196, 208) the Supreme Court has said: *"In December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or any of them."* And again: *"Not only does the Cherokee constitution thus provide that the lands shall be common property, but also the legislation of the Cherokee Nation from 1839 on to the present time abounds with acts speaking of these lands as 'public domain' or 'common property' of the Cherokee Nation."* And again (p. 208): *"Now, if these lands be the public domain, the common property of the Cherokee Nation, all who are recognized as members and citizens of that nation are alike interested and alike entitled to share in the profits and proceeds thereof."* And again (p. 212): *"It must be borne in mind that the rights and interest which the native Cherokees had in the reservation and outlet sprang solely from citizenship in the Cherokee Nation, and that the grant of equal rights as members*

of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship."

In that case this court had previously reviewed the statutes relating to the "public domain" of the Cherokee Nation and said (28 C. Cls. R., 281, 314): "With this power of legislation and control of the public domain and the *jus disponendi* lodged in the government of the nation, it is plain that the communal element has been reduced to a minimum and exists only in the occupied lands." The decision of the Supreme Court affirming the decision of this court goes further, and holds that all lands ceded by the treaties of February 14, 1833, and December 29, 1835, embraced in the patent issued in 1838, were "conveyed to the Cherokees as a nation," and consequently were never communal property.

The question whether all intermarried white citizens are entitled to share as such in the distribution of these lands, and the question whether all intermarried whites are citizens, are distinct questions.

3. The constitution of the Cherokee Nation (1839) found the lands of the Cherokees communal, and decreed that they "shall remain common property" (sec. 2). It made the improvements thereon "the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them," but made no provision concerning citizenship or the admission of aliens by adoption or naturalization. The grant of the legislative power is brief, but comprehensive: "The national council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the nation, which shall not be contrary to this constitution (sec. 14).

The amendments to the Constitution (1866) still declare that "the lands of the Cherokee Nation shall remain common property," but at the same time introduce a modification, "until the national council shall request a survey and allotment of the same in accordance with the provisions of article 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation" (sec. 2).

64 The right of a white person to become a citizen of the Cherokee Nation therefore was granted by statute, and not by the Constitution. It was a statutory, not a constitutional, right. It seems, therefore, clear that the power which created—the legislative power—might restrict, so long as it did not infringe upon any requirement of the Constitution.

In 1874 the rapidly growing value of the Cherokee lands was becoming perceptible. On the one hand there were white men who desired to marry into the tribe, and, marrying and residing in the nation, desired the rights and privileges of citizens; on the other hand there were white adventurers desiring to share in the wealth of the nation, soon, it was believed, to become available to individual citizens. The public welfare might be benefited by allowing the one, and most certainly would be conserved by excluding the other. No restriction appeared to exist in the constitution which would for-

bid the national council from admitting white men to citizenship upon the condition that they should not acquire an estate or interest in the communal of common property of the nation. Accordingly, the national council enacted, what was already the law by implication, an express proviso to section 75 of the Code of 1874: "That the rights and privileges herein conferred [the right of white persons to acquire citizenship by intermarriage] shall not extend to right of soil or interest in the vested funds of this nation;" which provision, however, did not take effect until November 1, 1875.

Whoever married after that enactment married with due notice of the limitation set upon his rights and privileges as a citizen. The statute seems just to the then communal or common owners, and seems but simple prudence and wisdom in looking to the exclusion of persons coming into the nation with unworthy, ulterior designs. There is no reason for overruling it unless it be contrary to the Cherokee constitution or the statutes of the United States.

The constitutional amendments of 1866 set forth that "All native-born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary acts of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion * * * shall be taken and deemed to be citizens of the Cherokee Nation" (sec. 5).

These constitutional amendments were brought about by the action of the United States at the close of the civil war in dictating that the slaves or freedmen or free persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens. But, be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States whereby their former slaves were made their political equals and the common property of the Cherokees was to be shared equally with their servants and dependents was in effect a revolution. The constitutional amendment quoted was simply declaratory of the new order of things. It is not necessarily prospective, and it does not impose limitations upon the legislative power with regard to the naturalization or future adoption of aliens as citizens.

Under the polity of the Cherokees citizenship and communal
65 ownership were distinct things. The citizen who annually received an annuity derived from a communal fund held by the United States, and the citizen who never received a dollar from the fund and never so much as thought of receiving it, formed a concrete object lesson in constitutional law not easily effaced from the common mind.

There are provisions in the statutes of the United States relating to the enrollment of the Cherokees for the purposes of the allotment of lands which have been relied upon as controlling the court and secur-

ing the property rights of all intermarried whites. But, in the language of Chief Justice Fuller in *Stephens v. Cherokee Nation* (174 U. S. R., 445, 488): "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former." It can not be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs or to confer upon white citizens property which they were not legally entitled to have. The term "citizens" in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands.

4 The question whether all intermarried whites are citizens is a distinct question. There come before the court a class of claimants known as the "married out and abandonment cases," claimants who allege on the one hand, that they became citizens of the Cherokee Nation by intermarriage, but concede, on the other hand, that they have since married persons, white persons, having no rights of Cherokee citizenship by blood, or that they have abandoned their Cherokee wives. It is contended on behalf of these claimants that the question of their continued citizenship or loss of citizenship can not be inquired into; that having once been entitled to the rights and privileges of citizenship as intermarried whites, they can only be deprived of them by a proceeding in the nature of office found.

"Every person is supposed to be a natural-born subject that is resident in the kingdom," says Bacon. (11 Wheat., p. 356.) If some such person, resident in the United States and therefore owing a local allegiance to this Government (*Carlisle & Henderson's case,* 16 Wall., 147), should bring an action in this court and the Government should file a plea to the jurisdiction averring that the claimant was an alien not entitled to maintain an action against the Government of this country within the intent and meaning of Revised Statutes, section 1068, could such a claimant turn around and say that the question of his citizenship could be inquired into only by office found? Assuredly not. The fact that there has been no proceeding in the nature of office found against these claimants does not, in the opinion of the court, control the case. Office found is a proceeding preliminary to the eviction of an alien in possession of real property which he is entitled to hold if he be not an alien. The King should not evict him forceably, and could not maintain an action of ejectment, not having a superior title. The proceeding is nothing more than a form of action. A man alleging one state of facts must sue in ejectment; alleging another state of facts,
66 he must sue in trespass, etc. So the King, seeking the aid of a court to establish the fact that the person in possession is incapable of holding the land as against the Crown, must do so by the proceeding of office found. These intermarried whites are not

grantees or devisees seized and in possession of land, occupying the position of defendants. They occupy the contrary position—of plaintiffs seeking to recover money—and it is obligatory upon them to establish their right to it. To say that a white man can share in the property of the Cherokees for the reason that at one time in his life he was the husband of a Cherokee woman, and to say that this court or the Secretary of the Interior must hold that he is still the husband of a Cherokee woman because the contrary has not been established in another proceeding, is an appeal to technicality which the court can not uphold. These claimants, like other plaintiffs, must prove their case; asserting a present right, they must establish present conditions. The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows and widowers), citizenship ceased; that when an intermarried white married a person having no rights of Cherokee citizenship by blood, it was conclusive evidence that the tie which bound him to the Cherokee people was severed and the very basis of his citizenship obliterated.

The Cherokee statute which has been cited (Laws of 1892, section 669) gives a proceeding in the nature of office found, but, nevertheless, is confirmatory of the views hereinbefore expressed. It relates to cases where the Cherokee government takes the initiative to accomplish a purpose. That is to say, where an intermarried white man has forfeited his rights of citizenship in the nation by acts which declare such forfeiture "and the nation requires his removal beyond the limits of its territory," this proceeding must be resorted to, to be followed by a call on the United States Indian agent "to remove such a white man." It is in principle precisely like the common-law procedure of office found, and exists for the same reason—that the Government may exercise a right dependent upon only the alienage of a person living within its territory presumably a citizen.

To prevent misapprehension, it is stated and to be understood that the only things intended to be decided by this opinion are, first, that, under the decision of the Supreme Court in *Cherokee Nation v. Journeycake* (155 U. S. R., 196, 208), the lands which are to be alloted among the Cherokees are not communal property, but constitute the public domain of the nation; second, that in this public domain all Cherokees by blood and whites by intermarriage who became citizens prior to the 1st day of November, 1875, are equally interested and have equal per capita rights in the allotment of lands; third, that the rights and privileges of those intermarried white citizens who married persons of Cherokee blood subsequent to the 1st day of November, 1875, do not extend to right of soil or interest in the vested funds of this nation, and that they are not entitled to share in the allotment of the public domain, except in cases where they paid into the general fund of the National Treasury the sum

of $500 each; fourth, that those white citizens who, subsequent to their marriage with persons of Cherokee blood, have married
67 persons not of Cherokee blood, and those white men who, being husbands of women of Cherokee blood, have abandoned their wives, are not citizens of the Cherokee Nation and are not entitled to participate in the allotment of these lands.

A decree will be entered in this case following the form of that which was entered in the case of *Journeycake v. Cherokee Nation* (28 C. Cls. R., 281), in accordance with the directions heretofore set forth in this opinion.

The facts stipulated by the parties (Record p. 99) and any additional facts which may be stipulated, will stand as the findings of the court for the purposes of appeal, if any. If no appeal be taken by any party the foregoing opinion will be certified to the Secretary of the Interior for his information and guidance, as provided by law, and in response to his communication of February 24, 1903.

68 VI.—*Findings of Fact and Conclusions of Law. Filed May 18, 1905.*

No. 76. Departmental.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE

vs.

THE UNITED STATES.

First: The subject matter of and the questions involved in this cause are as set forth in the letter of the Secretary of the Interior, dated February 24th, 1903, to be found on pages 2 and 3 of this record.

Second: The parties to this cause are as follows:

Males Marrying Cherokees Prior to 1875.

(*a.*) Solon James, and other male white persons in the Cherokee Nation, who shall possess the residence qualifications, and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation, entitled to share equally with full blood Cherokees in the distribution of the property of the tribe, by virtue of marriages entered into, subsequent to November 26th, 1866 under and in accordance with the law of the Cherokee Nation of October 15th, 1855, (regulating the intermarriages of white men) with Cherokee citizens by blood, (and who prior to September 1 1902, made application, as intermarried white claimants to the Commission to the Five Civilized Tribes, for enrollment under the Act of Congress of June 28, 1898, May 31, 1900, and July 1, 1902)

Males Marrying Delawares Prior to '75

(*b.*) John Doe, and other male white persons in the Cherokee Nation, who prior to September 1, 1902, made application, as intermarried white claimants, to the Commission to the Five Civilized Tribes for enrollment under the Acts of Congress of June 28th, 1898, May 31, 1900 and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the Tribe, by virtue of marriages under the law of the Cherokee Nation of October 15, 1855 subsequent to April 8, 1867, with those Delaware Indians who, by virtue of the treaty of July 1, 1866, and the contract thereunder of April 8, 1867, acquired the rights of native Cherokees in said nation.

Males Marrying Shawnees Prior to '75.

(*c.*) Richard Roe and other male white persons in the Cherokee Nation, who, prior to September 1, 1902, made application as intermarried white claimants, to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress of June 28th, 1898, May 31, 1900 and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe, by virtue of marriages subsequent to June 9th, 1869, under the law of the Cherokee Nation of October 15, 1855 with those Shawnee Indians who by virtue of the treaty of July 1, 1866, and the contract thereunder of June 9th, 1869, acquired the rights of native Cherokees in said nation.

Males Marrying Cherokees '75-77.

(*d.*) Thomas Little and other male white and foreign persons in the Cherokee Nation, who, prior to September 1, 1902, made application as intermarried white claimants to the Commission to the Five Civilized Tribes for enrollment under the Acts of Congress of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe by virtue of marriages with Cherokee citizens by blood, entered into under and in accordance with the law of the Cherokee Nation regulation the intermarriage of white men and foreigners subsequent to January 1, 1875, and prior to November 28th, 1877, none of whom paid, or

offered to pay into the general fund of the national treasury of the Cherokee Nation the sum of $500 or any other sum estimated as equivalent to the pro rata of each native Cherokee in the lands and vested wealth of the Cherokee Nation.

Males Marrying Delawares '74-'77

(*e.*) Jacob Bartles, and other male white and foreign persons in the Cherokee Nation, who, prior to September 1, 1902, made application, as intermarried white claimants to the Commission to the Five Civilized Tribes, for enrollment under the acts of Congress of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe by virtue of marriages entered into under and in accordance with the law of the Cherokee Nation, subsequent to January 1, 1875, and prior to November 28, 1877, with those Delaware Indians, who by virtue of the treaty of July 1, 1866, and the contract thereunder of April 8, 1867, acquired the rights of Native Cherokees in said nation none of said intermarried white persons, however, paying or offering to pay into the general fund of the national treasury of the Cherokee Nation the sum of $500 or any other sum estimated as equivalent to the pro rata share of each native Cherokee in the lands and vested wealth of the Cherokee Nation.

Males Marrying Shawnees '75 to '77

(*f.*) Thomas Jones and other male white and foreign persons in the Cherokee Nation, who prior to September 1, 1902, made application as intermarried white claimants, to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress
71 of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with the full blood Cherokees in the distribution of the property of the tribe, by virtue of marriages entered into under and in accordance with the law of the Cherokee Nation subsequent to January 1, 1875, and prior to November 28th, 1877, with those Shawnee Indians who by virtue of the treaty of July 1, 1866, and the contract thereunder of June 9th, 1869 acquired the rights of native Cherokees in said nation; none of said intermarried white persons however, paid or offered to pay into the general fund of the national treasury of the Cherokee Nation the sum of $500.00 or any other sum estimated as equivalent to the pro-rata share of each native Cherokee in the lands and vested wealth of the Cherokee Nation.

Males Marrying Cherokees '77 to 80.

(*g.*) James H. Cohee, and other male white and foreign persons in the Cherokee Nation, who, prior to September 1, 1902, made application as intermarried white claimants, to the Commission to the Five Civilized Tribes for enrollment, under the acts of Congress of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence quilifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the Tribe, by virtue of marriage with Cherokee citizens by blood, entered into under and in accordance with the law of the Cherokee Nation regulating intermarriage of white men and foreigners, subsequent to November 28th, 1877, and prior to December 11th, 1880.

Males Marrying Delawares '77 to '80.

(*h.*) William Warren and other male white and foreign persons in the Cherokee Nation, who, prior to September 1, 1902, made application, as intermarried white claimants, to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress of June 28th, 1898, May 31, 1900 and July 1, 1902, who shall possess
the residence qualifications and whose names shall appear
72 upon one or more of the census or other rolls of the Cherokee Nation, and who shall claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe by virtue of marriages entered into under and in accordance with the law of the Cherokee Nation regulating intermarriage of white men and foreigners, subsequent to November 28th, 1877, and prior to December 11th, 1880 with Delaware Indians, who, by virtue of the treaty of July 1, 1866, and the contract thereunder of April 8, 1867, acquired the rights of native Cherokees in said nation.

Males Marrying Shawnees '77-'80.

(*i.*) Richard Smith and other male white and foreign persons in the Cherokee Nation, who prior to September 1, 1902, made application, as intermarried white claimants, to the Commission to the Five Civilized Tribes, for enrollment under the acts of Congress of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe, by virtue of marriages entered into under and in accordance with the laws of the Cherokee Nation regulating intermarriage of white men and foreigners, subsequent to

November 28th, 1877, and prior to December 11th, 1880, with Shawnee Indians, who by virtue of the treaty of July 1, 1866, and the contract thereunder of June 9, 1869, acquired the rights of native Cherokees in said nation.

Males on the 1880 Roll.

(*j.*) William Jackson and other male white and foreign persons among those included within one of the foregoing classes, and whose names shall appear upon the authenticated census roll of the Cherokee Nation for the year 1880.

Females on the 1880 Roll.

(*k.*) Amanda Jones and other female white and foreign persons among those included within one of the foregoing classes and whose names shall appear upon the authenticated census roll of the Cherokee Nation for the year 1880.

73 *Males Marrying Cherokees* '80 *to* '95.

(*l.*) George W. Seigel and other male white and foreign persons, who prior to September 1, 1902, made application, as intermarried white claimants, to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress of June 28th, 1898, May 31st, 1900, and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe, by virtue of marriages entered into under and in accordance with the law of the Cherokee Nation regulating the intermarriage of white men and foreigners (as amended on December 11, 1880) from said date to December 16th, 1895 with Cherokee citizens by blood.

Males Marry Delawares '80 *to* '95.

(*m.*) William Johnstone and other male and white foreign persons who, prior to September 1, 1902, made application as intermarried white claimants to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress of June 28th, 1898, May 31st, 1900, and July 1, 1902, who shall possess the residence qualifications and whose names shall appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the right to be enrolled as citizens of the Cherokee Nation, entitled to share equally with full bloods in the distribution of the property of the tribe, by virtue of marriages entered into subsequent to December 11th, 1880, and prior to December 16th, 1895, under and in accordance with the law of the Cherokee Nation regulating the intermarriage of white men and foreigners, as amended on December 11th,

1880, with Delaware Indians, who by virtue of the treaty of July 1, 1866, and the contract thereunder of April 8, 1867, acquired the rights of native Cherokees in said nation.

74 *Males Married to Cherokees, but are on no Roll.*

(*n.*) Samuel G. Mills, and other male or female white and foreign persons, if there be any, who, prior to September 1, 1902, made application, as intermarried claimants, to the Commission to the Five Civilized Tribes, for enrollment under the acts of Congress of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence qualifications, and who claim that they have been recognized by the tribal authorities of the Cherokee Nation as citizens thereof, but whose names are not found on any of the census or other rolls of the Cherokee Nation, nor have they in any wise been admitted to the privileges of citizenship therein by the National Council or other authority, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe by virtue of marriages with Cherokee citizens by blood, entered into under and in accordance with the law of the Cherokee Nation regulating intermarriage of white men and foreigners subsequent to December 11th, 1880, and prior to December 16th, 1895.

Whites Admitted by Act of Council.

(*o.*) Scoonse, husband of Eliza Woodall, A. G. Greenway and other male and female white and foreign persons in the Cherokee Nation, who, prior to September 1, 1902, made application to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress of June 28th, 1898, May 31, 1900, and July 1, 1902, who shall possess the residence qualifications, and who claim the right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the Tribe, by virtue of a marriage with a Cherokee citizen by blood, not contracted and solemnized under any law of the Cherokee Nation, but under the law of some other jurisdiction, as to whom the National Council of the Cherokee Nation has passed special Acts, providing that they were "admitted" or "readmitted" to citizenship the same as other adopted citizens of the Nation, rights, benefits, etc. such as the law gives adopted citizens, provided they comply with the law regulating intermarriage with white men.

75 (*p.*) Talitha J. Adair and other female white persons in the Cherokee Nation who shall possess the residence qualifications, and whose names appear upon one or more of the census or other rolls of the Cherokee Nation, and who claim the rights to be enrolled as citizens entitled to share equally with full blood Cherokees in the distribution of the property of the tribe by virtue of a marriage with a Cherokee male citizen by blood or with a Delaware-

Cherokee male citizen by blood, or with a Shawnee-Cherokee male citizen by blood, entered into subsequent to November 26, 1866, and prior to December 16, 1895, under and in accordance with the laws and customs of the Cherokee Nation, as shown by the evidence in this case, in force and applicable to such marriages at the time such marriages were entered into, and who, prior to September 1, 1902, made application as intermarried white claimants to the Commission to the Five Civilized Tribes for enrollment under the acts of Congress of June 28, 1898, May 31, 1900 and July 1, 1902.

Married Oui and Abandonment.

In the event this court should conclude that any of the foregoing white or foreign persons have a right to be enrolled as citizens of the Cherokee Nation entitled to share equally with full blood Cherokees in the distribution of the property of the tribe, then two other questions arise affecting a limited number of claimants:

(*q.*) Robert Kraus and those other white and foreign claimants who may come within the class that may be determined by the court entitled to enrollment, and whose Cherokee husbands or wives have died, and of whom it is alleged they were afterward remarried to persons not citizens of the Cherokee Nation by blood, in violation of the law of the Cherokee Nation under which the privileges of citizenship were extended to them. No proceeding was ever instituted or had against any of these claimants in, nor was there any adjudication had concerning these claimants by the circuit court of the Cherokee Nation, nor any other court; but the Commission to the Five Civilized Tribes and the Secretary of the Interior refused to enroll these claimants, independent of the question as to whether they might otherwise be entitled to enrollment, basing such refusal
76 upon their interpretation of the laws of the Cherokee Nation and testimony of witnesses before said Commission as to the alleged facts of such death and re-marriage.

(*r.*) James H. Akin and those other white and foreign claimants who may come within the class that may be determined by the court entitled to enrollment, but who it is alleged have abandoned their Cherokee wives or husbands, in violation of the law of the Cherokee Nation, under which the privileges of citizenship were extended to them. No proceeding was ever instituted or had against any of these claimants, nor was there ever any adjudication had concerning these claimants by the circuit court of the Cherokee Nation, or any other court; but the Commission to the Five Civilized Tribes and the Secretary of the Interior refused to enroll these claimants independent of the questions as to whether they might otherwise be entitled to enrollment, basing their refusal upon their interpretation of the laws of the Cherokee Nation, and testimony of witnesses before said Commission as to the facts of such abandonment.

That the matter contained in the above stipulation may be considered by this honorable court and the Supreme Court of the United

States on appeal, as, if fully proved, and that the persons mentioned as parties may be deemed to be properly before this honorable court, which it is hereby agreed has jurisdiction to pass on the merits of the case of each and every of said claimants.

That in the event that this court or the Supreme Court of the United States on appeal is of the opinion that any or all of the claimants are entitled to participate in the distribution of the lands and funds of the Cherokee Nation, that the Secretary of the Interior may be authorized to make up a roll of such claimants in accordance with the decree of this honorable court or of the said Supreme Court of the United States on appeal.

77 Third. That the Cherokee national council, with the approval of the principal chief, on the 15th of October, 1855, passed the following act:

"An Act Regulating Intermarriages with White Men.

"Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this nation: Therefore.

"*Be it enacted by the national council,* That any 'unmarried' white man desiring to marry a Cherokee woman shall be, and is hereby, required to obtain a license for the same from any of the clerks of the district courts of the several districts.

"*Be it further enacted,* That before any license as provided above shall be issued, the person applying shall be, and is hereby, required to pay to the clerk to whom application is made the sum of five dollars, and also required to take the following oath:

" 'I do solemnly swear that I will honor, defend, and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States Government or its judicial tribunals any protection, privileges, or redress, incompatible with the same as guaranteed to the Cherokee Nation by the United States, in treaty stipulations entered into between them.'

"*Be it further enacted,* That all white men applying for license, as provided in the first section of this act, shall, before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

"*Be it further enacted,* That all judges of this nation, and every regular minister of all evangelical denominations having the care of souls, are hereby authorized and empowered to solemnize the rites of matrimony, according to the ceremonies usually observed and performed in such cases, under the provisions of this act.

"*Be it further enacted,* That no marriage between a citizen of the United States and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided, shall be legal; and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before

any district court of this nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be entitled for his services to twenty per cent of the amount collected, and who shall place the remainder in the hands of the national treasurer for public benefit.

"*Be it further enacted,* That persons performing the marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to the back of the license, which shall be returned. The holder of the license and certificate shall then place the same in the hands of the clerk of the district court, whose duty it shall be to record the same in his office.

"*Be it further enacted,* That any white citizen of the Cherokee Nation, by marriage, etc., who shall use the intercouse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, shall forfeit his right of citizenship to the same, and be subject to be dealt with as other white intruders in the country, and shall be removed out of this nation.

"*Be it further enacted,* That should any white man or woman become a citizen of the Cherokee Nation by marriage and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widower or widow shall continue to enjoy Cherokee privileges, unless such white widower or widow shall marry a white man or woman (as the case may be); then, in that case, all of his or her right to Cherokee citizenship shall cease.

"*Be it further enacted,* That any white man who shall lawfully marry under the provisions of this act, and then or afterwards abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation, but shall be, and is hereby, considered, and shall be removed, as an intruder."

Fourth. That the act of the national council approved December 11, 1880 (testimony W. O. Bruton, p. 7), is the only act passed by the national council and approved by the principal chief in the year 1880 upon the subject of intermarriage of white persons and foreigners in the Cherokee Nation, and that said act is the only act passed by the national council on December 10, 1880, upon that subject, and that the quotation on page 7 of the answer in this cause is taken from the compilation of the laws of the Cherokee Nation made in 1892.

78 Fifth. In chapter 12, article 15, section 75, relating to "intermarriage of whitemen and foreigners," of the new code of Cherokee laws which became effective Nov. 1st., 1875, the following proviso was enacted by the National Council, to wit:

"That the rights and privileges herein conferred, shall not extend to right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general fund of the national treasury, a sum of money to be ascertained and fixed by the National Council, equal to the "pro rata" share of each native Cherokee,

in the lands and vested wealth of the nation, estimated at five hundred dollars, and thereafter conform to the constitution of the nation, and to the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to all the rights of other Cherokees."

Sixth. That by the act of the Cherokee Council approved Nov. 28th, 1877, chap. 12, article 15, section 75, above refererd to was amended by striking out all of said section after the words "this nation" where said words occur in the third line in such proviso of said section. By such amendment that portion of said section permitting intermarried persons to acquire a share in the lands and vested wealth of the Cherokee Nation by the payment of the sum of five hundred (500 dollars was repealed and said proviso as amended reads as follows:—

"*Provided also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation."

Seventh. November 27th, 1880, the following act was passed:

"Whereas, quite a number of our citizens have intermarried with Indians, members of other tribes in this territory, and it has always been the custom of our people to recognize such marriages as legal until the taking of the last census, when their rights as citizens were called in question: Therefore,

"*Be it enacted by the national council,* That an Indian, a member of any of the tribes of this territory, who has married or shall hereafter marry a Cherokee citizen of this nation, at the time of such marriage, in accordance with the law regulating marriage between our own citizens, shall be, and is hereby, deemed a Cherokee citizen to all intents and purposes, and entitled to all the rights of other Cherokees."

79 Eight. Dec. 11th, 1880, the following act was passed:

"'Ten respectable citizens of the Cherokee Nation, who are Cherokees, Delawares, or Shawnees by blood, be authorized to sign a certificate of moral character of any white man or foreigner desiring a license to marry a Cherokee, Delaware, or Shawnee woman.

"'*Be it further enacted,* That all citizens of the United States and foreigners obtaining a license to marry a Cherokee, Delaware, or Shawnee woman under the provisions of section 69, article 15, New Code, be required to pay the district clerk the additional sum of $5, to be turned over to the national treasurer for the benefit of the Cherokee Nation on the first Monday in November of each year, beginning with 1881.'

"Tahlequah, Cherokee Nation, December 10, 1880.

"OSI HAIRE,
Speaker of Council.
"D. R. HICKS,
Clerk of Council.

"Concurred in by Senate, with the following amendments:

"'*Be it further enacted,* That all United States citizens or foreign-

ers desirous of marrying a Cherokee, Delaware, or Shawnee woman, citizen of this nation, shall on application for marriage licenses present to the clerk of the district in which he is desirous of marrying a certificate of good moral character, signed by the county clerk and sealed with the seal of the county of which he is a legal voter.'

"December, 1880.

"S. H. BENGE,
President of Senate.
"J. L. SPRINGSTER,
Clerk of Senate.

"Amendment concurred in by council December 11, 1880.

"OSI HAIRE,
Speaker of Council.
"D. R. HICKS,
Clerk of Council.

"Approved December 11, 1880.

"D. W. BUSHYHEAD,
"Principal Chief of Cherokee Nation."

Ninth. December 9th, 1880, the following act was passed:

AN ACT AUTHORIZING THE CENSUS RETURNS OF 1880, AND PROVIDING FOR A COPY THEREOF.

SECTION 1. *Be it enacted by the national council,* That the register or schedule of citizens of the Cherokee Nation submitted to the principal chief by the census takers of the year 1880, under requirement of the act providing for taking the census of the Cherokee Nation, as the said register or schedule has been examined, revised, and amended by the committees of the present national council, duly appointed for the purpose and by them submitted to and accepted by the council, is hereby approved as a true and correct list of persons acknowledged and recognized to be citizens of the Cherokee Nation at and within the time the said census was authorized to be taken.

SEC. 2. *Be it further enacted,* That there shall be made in fair and legible handwriting and under the supervision of the principal chief, as a neat and complete alphabetical transcript or copy of all names of citizens and noncitizens to be found in the census returns revised and amended as before mentioned, with such descriptive matters and things as are attached to each name. The work of making such copy shall be done by two clerks of the executive department, duly appointed and instructed by the principal chief to perform the same; and who shall receive as compensation therefor, when the said work shall have been finished, approved, and filed as provided by this act, the sum of ($250.00) two hundred and fifty dollars each, for which

amounts the principal chief is authorized to draw "preferred" warrants upon the general fund.

The said transcript or copy shall be made upon blank forms of the like kind furnished the census takers to take the census of 1880.

SEC. 3. *Be it further enacted,* That when the said copy shall be made and completed as hereinbefore provided, the "returns" of each district as copied shall be by the said clerks submitted to the principal chief duly certified to by them as to pages, number of names in each schedule, and that the copy has been made correctly according to the provisions of this act. When so certified, and upon the examination of the principal chief approved by him, he shall be authorized to indorse the copy of the returns of each district as so approved, and place the same on file in the executive office for safe-keeping and general reference under his care and direction.

80 SEC. 4. *Be it further enacted,* That any person, citizen of this nation at the time of taking the census of 1880 (March and April), who shall have been inadvertently omitted to be so registered by the census takers or the committee appointed to revise the census, and whose name does not appear enrolled or recorded otherwise, and who shall desire to be enrolled as a citizen shall be required to make satisfactory showing to the principal chief, by methods and evidence which he may consider sufficient in each case, that such person was a citizen of the nation when the census was being taken and of what district, and the principal chief is requested to report the names of all persons who shall apply under this section with the material facts ascertained by him in each case to the national council of 1881 for their information and action.

SEC. 5. *Be it further enacted,* That all persons whose names have been reported by the census takers in schedule 1 as citizens, and whom the revising committees of this council have marked and signified as not entitled to be returned, shall be summoned by the principal chief to appear before the commission on citizenship at their next September session (1881) for the adjudication of their claims according to the provisions of law relating to "doubtful citizens" and the names of all persons who have appeared shall appear before said commission as "doubtful citizens," either by authority of the acts of December 3, 1879, and authorizing the taking of the census (not including "new claimants" enrolled in schedule 4), or by authority of this act in whose favor the said commission have decided or shall decide, shall be by the executive secretary attached to the official copy of citizens hereinbefore authorized to be made and filed in the executive office.

(Tahlequah, Cherokee Nation), December 6, 1880.

S. H. BENGE,
President Senate.

J. L. SPRINGSTON,
Clerk of Senate.

Concurred in by the council December 9, 1880.

OSI HAIR,
Speaker Council.

D. R. HICKS,
Clerk Council.

Approved December 9, 1880.

D. W. BUSHYHEAD,
Principal Chief Cherokee Nation.

Tenth. The National Council requested the survey and allotment of the lands of the Cherokee Nation in accordance with the provisions of Article 20th of the Treaty of the 19th of July, 1866, between the United States and the Cherokee Nation as provided for by Section 2, Article 1 Amendments to the Constitution of the Cherokee Nation.

Eleventh. That the Cherokee national council, with the approval of the principal chief, on December 6, 1890, passed the following act:

"AN ACT giving the circuit courts authority to declare the forfeiture of the rights of certain adopted citizens.

"Be it enacted by the national council, That the circuit courts shall have authority to hear and determine all cases that may be brought before it by the solicitors of the several districts, or other persons wherein it may be alleged that any citizen of the United States or other government, adopted by intermarriage under the laws of the Cherokee Nation, has forfeited the rights of citizenship by acts which declare such forfeiture. Proceedings in such cases shall be by citation if the party be resident in the Cherokee Nation, or by thirty days' notice of such proceedings in the Cherokee Advocate, and be conducted as are civil suits before such courts. On the finding of verdict by the jury against such person, it shall be the duty of the clerk of the court to notify the principal chief of such finding, and it shall be the duty of the principal chief to make known such finding to, and call on, the United States Indian agent for the removal of such person beyond the limits of the Cherokee Nation. It shall not be lawful thereafter for any clerk to issue a marriage license or permit to reside in the Cherokee Nation, in any capacity whatever, to any person so declared to have forfeited his rights to citizenship in the Cherokee Nation."

81 That during the time the law contained in the New Code of 1875, chapter 12, sections 67 to 76, inclusive, was in force, and until the same was amended on November 28, 1877, but two intermarried white persons availed themselves of the opportunity offered by the proviso of section 75 of said law, and paid into the Cherokee treasury the sum of $500 each; and that neither of said persons is a party to this suit.

That on the 8th day of April, 1867, articles of agreement were

entered into between the Cherokee Indians and the Delaware tribe of Indians; that said agreement is fully set forth commencing at page 277 of Exhibit A (New Code of 1875).

That on the 7th day of June, 1869, articles of agreement were entered into between the Cherokee Indians and the Shawnee tribe of Indians; that said agreement is fully set forth commencing at page 281 of Exhibit A (New Code, 1875).

That the Cherokee national council (in the exercise of its power to construe treaty stipulations) did, on the 27th day of April, 1886, pass an act construing the rights designed to be conferred upon freedmen and civilized Indians by the ninth and fifteenth articles of the treaty of 1866; and that the copy of said act as found in the compilation of the Cherokee laws of 1892, at pages 370 to 373, inclusive, is a true and correct copy of the original act, and that said printed copy may be used and considered to the same extent as if it was the original.

Twelfth. That the Cherokee national council, with the approval of the principal chief, on the 19th of May, 1883, passed the following act:

"AN ACT providing for the payment of the balance due on lands west of 96 degrees per capita.

"*Be it enacted by the national council,* That when the additional amount appropriated by the act of Congress of March 3rd, 1883, shall have been received by the treasurer of the Cherokee Nation the principal chief shall cause the same to be paid out 'per capita' to the citizens of the Cherokee Nation by Cherokee blood.

"*Be it further enacted,* That for the purpose of carrying out the provisions of this act the principal chief shall at his earliest convenience appoint two competent persons in each district to make correct census roll of the persons entitled and turn over the same, certified to by him, to the treasurer of the Cherokee Nation, who shall file the same in his office.

"*Be it further enacted,* That the persons appointed by the principal chief to take the census shall each be entitled to ($3.00) dollars a day while in actual service.

"*Be it further enacted,* That as soon as advised by the proper authority that the funds are ready, it shall be the duty of the treasurer to make requisition for the same, and on receiving said funds it shall be his duty to pay the same out per capita to citizens of the Cherokee Nation by blood according to the census roll. In making said payments the treasurer is hereby directed to pay the funds in person to all adult persons entitled to the same, and to parents, guardians, and heads of families representing minors and disabled persons, and to no other person or persons whomsoever; it shall be the duty of the treasurer to keep a receipt roll of the payments made and to whom, and which shall be reported to the national council next following said payment.

"*Be it further enacted,* That the sum of three hundred dollars, or so much thereof as may be necessary to defray the expenses of taking the census and preparing the proper roll, is hereby appropriated out of the funds to be received for this purpose.

"*Be it further enacted,* That the treasurer shall make the payment at Tahlequah, Vinita, Ft. Gibson, and Webbers Falls."

Thirteenth. That the Cherokee national council, with the approval of the principal chief, on November 26, 1890, passed an act providing for the distribution of the proceeds from lease of lands in the Cherokee Outlet to Cherokees by blood only.

Fourteenth. That the Cherokee national council, with the approval of the principal chief, on November 29, 1878, passed the following act:

"*Be it enacted by the national council,* That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and they are hereby readmitted into the rights and privileges of citizens of the Cherokee Nation; provided that the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation."

Fifteenth. That the Cherokee national council, with the approval of the principal chief, on December 3, 1878, passed the following act:

82 "*Be it enacted by the national council,* That David N. Allen, Mary Allen, and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens."

Concurred in by council with following amendment:

"Provided that David N. Allen, the petitioner, shall not acquire any rights except such as attach to white men, adopted citizens of (the) Cherokee Nation."

Sixteenth. That subsequent to the passage of the act approved on October 15, 1855, and particularly since the law enacted in the New Code of 1875, a large number of white persons have intermarried with Cherokees, and resided continuously thereafter in the Cherokee Nation, and did so reside at the time the distribution of funds belonging to the Cherokee people were made, in accordance with the various acts of the national council passed subsequent to 1875, or under judgments of the courts, and they were advised of said payments and were present when the same were made; and that a large number of said intermarried white persons participated in such payments by receiving moneys thereat for and on behalf of different members of their families who were entitled to the same by reason of their Cherokee blood, or because such members of their family were Delawares, Shawnees, or freedmen who had acquired the rights of native Cherokees by purchase or express grant.

Seventeenth. That no action at law or suit in equity was ever brought against the Cherokee Nation under the act respecting the liability of the nation to her own citizens, found in sections 130, 131, 132, 133, inclusive, chapter 26, New Code (1875), for or on behalf of any intermarried white person, asserting any claim to a share or

interest in the funds or any portion thereof which have been distributed since 1875.

Eighteenth. That Pauline Shannon, a Cherokee Indian woman by blood, and claiming rights of property as such, married George Shannon, a white man, prior to January 1, 1895, in accordance with the laws of the Cherokee Nation governing the intermarriage of white men and foreigners, and that children had been born to such marriage.

That S. M. Barbee, a Cherokee Indian woman by blood, and claiming rights of property as such, married Samuel Barbee, a white man, prior to January 1, 1895, in accordance with the laws of the Cherokee Nation governing the intermarriage of white persons and foreigners.

That in the year 1895 said Pauline Shannon and said S. M. Barbee, each for herself, and the first named for her children also, brought suit against Stephen Tehee, as assistant and acting chief of the Cherokee Nation, under the provision of the act respecting the liability of the Cherokee Nation to her own citizens, found in sections 130 to 133, inclusive, article 26, of the New Code (1875), demanding a distributive share for themselves, and Pauline Shannon for her children likewise, in the funds distributed by the Cherokee Nation theretofore; that judgment was rendered in favor of said parties and against the Cherokee Nation in the circuit court of said nation, and upon appeal to the supreme court of the Cherokee Nation that judgment was affirmed.

At the time said suits were instituted, and during the pendency of each in the courts of the nation, and at the time final judgment was entered, both George Shannon and Samuel Barbee, intermarried white persons, and husbands of the said Pauline Shannon and S. M. Barbee, respectively, lived with his wife and was acknowledged as a citizen of the Cherokee Nation by intermarriage; that neither of them had participated in the distribution of said funds; that neither of them were parties to either of said suits; nor did either of them make application to be made a party; nor was any claim made theretofore; nor has there been since on behalf of either of them for a distributive share of said funds, or any portion thereof, under said law (sections 130-133, article 12, Code, 1875).

Nineteenth. That the Cherokee national council, with the approval of the principal chief, on December 3, 1879, passed the following act:

AN ACT for Taking a Census of the Cherokee Nation for the Year 1880.

SECTION 1. *Be it enacted by the national council,* That two expert and responsible persons, one of whom talks (speaks) the Cherokee language, to be appointed by the principal chief (in each district), and who shall be resident of the district from which they are appointed, be and they are hereby directed and authorized to take

the census of their respective districts between the first day of March and the first day of May, 1880, and make full and certified returns thereof to the principal chief on or before the first day of June of said year. That said census takers before entering upon the duty hereby assigned to them shall take an oath for the full, impartial, and correct performance of the same, as hereinafter defined.

83 "SEC. 8. That it shall be the duty of said census takers to take a full and complete return of all persons found residing or sojourning within the limits of the respective districts at the time of making the enumeration, as required by the foregoing section. And said returns shall show the names of all heads of families, giving a complete registration of births, deaths, and marriages; also the age and sex; the names of all males above the age of eighteen years; the names of all females above the age of eighteen; the names of all males under the age of eighteen years; the names of all females under the age of eighteen years; the names, sex, and ages of all orphans under sixteen years; the names of all whites entitled by law to citizenship within the ages specified; the names of all whites not so entitled; the names of all colored persons entitled by law to citizenship, within said ages, and the names of all such persons not so entitled, and the names of all Indians not so entitled; also a report of the chief production of agriculture, including the number of horses, cattle, hogs, sheep, etc., during the year ending May first, 1880.

"SEC. 3. That it shall be the duty of the principal chief to cause ruled blanks to be prepared of a suitable and convenient form and furnish to said census takers, for the purpose of making the enumeration herein provided for, and said census takers shall be allowed three dollars a day in the performance of the duties hereinbefore imposed upon them.

"SEC. 4. That it shall be the duty of the principal chief to cause a summary of the returns of said census to be prepared and paid before the national council, together with the full returns of the same, at the beginning of the annual session thereof in 1880. And said returns shall serve as a basis for the representation of the several districts of the Cherokee Nation in the national council, in accordance with the amendment to the constitution dated November 21, 1886.

"SEC. 5. *Be it further enacted,* That all persons whose rights to citizenship in the Cherokee Nation shall be called in question, and who shall be reported to by the persons authorized by this act to take the census of the Cherokee people, on the list of doubtful persons, shall be required by the principal chief to appear before the commission on citizenship at Tahlequah during the month of September, 1880, for the adjudication of their claims to Cherokee citizenship.

"SEC. 6. *Be it further enacted,* That the sum of two thousand four hundred and sixty ($2,460) be and the same is hereby appropriated out of the money in the general fund not otherwise appropriated to defray the expenses of census takers and for necessary stationery, and the principal chief is hereby authorized to draw preferred warrant for the same."

Twentieth. That the names of the following intermarried white persons appear upon the census roll of 1880, referred to in secanin 1, act of Congress of July 28, 1898, and show the manner in which the admitted whites were enrolled:

No.	Name.	Nativity.	Age.	Sex.
1970	Walker, Sarah	A. white	23	F.
1963	Wallace, Martin	A. white	32	M.
1846	Weaver, Mary	A. white	40	F.
1825	Vickory, Mary	A. white	17	F.
1789	Thomas, William	A. white	33	M.
1373	Randolph, Martha	A. white	36	F.
1366	Rogers, John	A. white	35	M.
1346	Robins, Sarah	A. white	29	F.
1343	Quarles, William	A. white	39	M.
1178	Mulcar, Mike	A. white	36	M.

That an examination of said census roll discloses that it was made as provided and required by the act of the national council, approved December 3, 1879; and that appended to each name upon said roll is a memorandum or descriptive matter which shows whether or not, and if so, how such person became and was a citizen of the nation—that is to say, whether he was a Cherokee by blood, a Delaware, a Shawnee, a freedman, or an intermarried white person.

Twenty-first. That on the 12th day of August, 1902, the same being the day on which the act of Congress of July 1, 1902, was voted upon at a special election held in the Cherokee Nation for that purpose, there were then residing in the Cherokee Nation, approximately, 2,800 intermarried white men of voting age under the laws of said nation, and whose only claim to rights therein was and is based upon a marriage, prior to said election, in acordance with the laws of the Cherokee Nation respecting intermarriage of white men and foreigners; and that at said election held for said purpose, practically all of said white persons of voting age who had intermarried into the Cherokee Nation as aforesaid, were permitted to vote and did vote, and that more than 2,500 of said white persons voted in favor of said act of Congress; that the majority in favor of said act of Congress, on the face of the returns, including the votes of said 2,500 intermarried white persons, was 1,800 votes.

84 Twenty-second. Under the customs of the Cherokees a white woman intermarrying with a Cherokee citizen acquires the same rights in respect to property as a white man intermarrying with a Cherokee woman.

85 *Conclusions of Law.*

That such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said nation, and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1st, 1875, and those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives have no part or share in the Cherokee property and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people and are not entitled to be enrolled for such purpose.

BY THE COURT.

86 Departmental No. 76.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE

v.

THE UNITED STATES.

VII.—*Decree. Filed May* 18, 1905.

This case having been transmitted to this court by the Secretary of the Interior by letter dated February 24th, 1903, for the findings and opinion of the court in accordance with the provisions of section 2 of the act of Congress of March 3rd, 1883, entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," (22nd Stats. 485); and Congress by the act of March

3rd, 1905, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30th, 1906, and for other purposes" having made the following enactment:—

"That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, departmental, numbered seventy-six,' now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing."

87 And the cause coming on to be heard upon the petition, answers, agreed facts, proofs and arguments submitted by the attorneys of the parties to the cause respectively and the court having heard and fully considered the same;

And it appearing to the court that all those white persons who married Cherokee Indians by blood subsequent to the enactment of the Cherokee law which became effective November 1st, 1875, and which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the Nation, had due notice of the limitations set upon their rights and privileges as citizens; and that those white persons who married Cherokee citizens by blood prior to said date, acquired rights as citizens in the lands belonging to the Nation and held and owned as national lands, except such of these intermarried persons as lost their rights as Cherokee citizens by abandoning their Cherokee wives or by marrying other white or non-tribal men or women having no rights of citizenship by blood in said Cherokee Nation;

It is by the court ordered, adjudged and decreed that such white persons residing in the Cherokee Nation as become Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December 1838; that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said Nation, and are not

entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1st, 1875, and
88 those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives have no part or share in the Cherokee property and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people and are not entitled to be enrolled for such purpose.

BY THE COURT.

89 VIII.—*Application of Cherokee Citizens by Blood of the Cherokee Nation for, and allowance of, appeal.*

Departmental No. 76.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE,

v.

THE UNITED STATES.

The Cherokee citizens by blood of the Cherokee Nation, parties to this cause, by their attorney John J. Hemphill, on this 5th day of June, 1905, make application for and give notice of an appeal to the Supreme Court of the United States, from that portion of the decree in this case filed May 18th, 1905, which orders, adjudges and decrees that such white persons, residing in the Cherokee Nation, as became Cherokee citizens under Cherokee laws, by intermarriage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood, in the lands, constituting the public domain of the Cherokee Nation, and in any funds derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, and are entitled to be enrolled for that purpose.

(signed) JNO. J. HEMPHILL,
Attorney for Cherokee Citizens by Blood,
Parties to this Cause.

Filed June 5, 1905.

Order.

Appeal allowed this 20th day of June, 1905.

(signed) C. C. NOTT, *Chief Justice.*

90 IX.—*Application of the Cherokee Nation for, and Allowance of, Appeal.*

Departmental No. 76.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE,
v.
THE UNITED STATES.

The Cherokee Nation, party to this cause, by its attorney L. F. Parker, Jr., on this 6th day of June, 1905, makes application for and gives notice of an appeal to the Supreme Court of the United States, from that portion of the decree in this case filed May 18th, 1905, which orders, adjudges and decrees that such white persons, residing in the Cherokee Nation, as became Cherokee citizens under Cherokee laws, by intermarriage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood, in the lands, constituting the public domain of the Cherokee Nation, and in any funds derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, and are entitled to be enrolled for that purpose.

(signed) L. F. PARKER, JR.,
Attorney for Cherokee Nation.
By JNO. J. HEMPHILL.

Filed June 7, 1905.

Order.

Appeal allowed this 20th day of June, 1905.
(signed) C. C. NOTT, *Chief Justice.*

91 X.—*Application of Intermarried Whites, Parties in this Cause, for, and Allowance of, Appeal.*

Departmental No. 76.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE,
v.
THE UNITED STATES.

The intermarried whites, parties to this cause, by their attorneys, William Henry White, Harry G. Kimball, A. E. L. Leckie, and Creed M. Fulton, on the 8th day of June, 1905, make application for and

give notice of an appeal to the Supreme Court of the United States from all of the decree in this case filed May 18, 1905, except that portion which orders, adjudges and decrees that such white person residing in the Cherokee Nation, as became Cherokee citizens under Cherokee law, by intermarriage with Cherokees by blood prior to the first day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood, in the lands, constituting the public domain of the Cherokee Nation, and in any funds derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, and are entitled to be enrolled for that purpose.

(signed) WM. HENRY WHITE,
HARRY G. KIMBALL,
A. E. L. LECKIE,
CREED M. FULTON,
Attorneys for Intermarried Whites.

Filed June 8, 1905.

Order.

Appeal allowed this 20th day of June, 1905.

(signed) C. C. NOTT, *Chief Justice.*

92 XI.—*Application of Persons Claiming Rights in the Cherokee Nation by Intermarriage for, and Allowance of, Appeal.*

Departmental No. 76.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE

v.

THE UNITED STATES

The persons claiming rights in the Cherokee Nation by intermarriage by their attorneys of record, James S. Davenport and William T. Hutchings pray that an appeal may be allowed them in the above entitled cause from a judgment rendered in said cause against them on the 18th day of May, 1905, and that the Clerk of the Court of Claims be directed to send the record and proceedings in said cause to the Supreme Court of the United States, and notice is hereby given of the application for said appeal.

(signed) WILLIAM T. HUTCHINGS,
JAMES S. DAVENPORT,
Attorneys for Persons Claiming Rights in Cherokee Nation by Intermarriage.

Filed June 15, 1905.

Order.

It is hereby ordered that the appeal in the above-entitled case t
the Supreme Court of the United States be and is hereby allowed a
prayed.

June 20, 1905.

(signed) C. C. NOTT,
Chief Justice of the Court of Claims.

93 Court of Claims.

No. 76 Departmental.

IN THE MATTER OF ENROLLMENT OF PERSONS CLAIMING RIGHTS I
THE CHEROKEE NATION BY INTERMARRIAGE
vs.
THE UNITED STATES.

I John Randolph Assistant Clerk of the Court of Claims certif
that the foregoing are true transcripts of the pleadings in the abov
entitled cause, of the opinion of the court—of the findings of fa
and conclusions of law filed by the court—of the decree of the cour
of the application of the respective claimants for appeal to the S
preme Court of the United States and of the allowance of the sam

In testimony whereof I have hereunto set my hand, and affixe
the seal of said Court of Claims this 15 day of July A. D. 190

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,921. Court of Claims. Ter
No. 419. Daniel Red Bird *et al.*, citizens of the Cherokee Nation b
blood, appellant, *vs.* The United States. File No. 19,922. Ter
No. 420. The Cherokee Nation, appellant, *vs.* The United State
File No. 19,923. Term No. 421. Francis B. Fite *et al.*, interma
ried white persons, claiming to be entitled to citizenship in the Cher
kee Nation, appellants, *vs.* The United States. File ..o. 19,92
Term No. 422. The Persons Claiming Rights in the Cherokee N
tion by Intermarriage, appellants, *vs.* The United States. Filed Oct
ber 6th, 1905. File Nos. 19,921–2–3 & 4.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 125

DANIEL RED BIRD *et al.*, CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

Office Supreme Court U. S.
FILED
FEB 12 1906
JAMES H. McKENNEY,
Clerk.

No. 126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 127

FRANCIS B. FITE, *et al.*, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

Brief on Behalf of Cherokee Citizens by Blood.

JOHN J. HEMPHILL,
Attorney for Cherokees by Blood.

K. S. MURCHISON,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD *et al.*, CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE, *et al.*, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

STATEMENT, BRIEF AND ARGUMENT IN BEHALF OF THE CHEROKEES BY BLOOD.

Statement of Facts.

The Congress of the United States, through the instrumentality of the Commission to the five civilized tribes of Indians, commonly designated the Dawes Commission, under the supervision of the Secretary of the Interior, is subdividing the lands of the Cherokee Indians for the purpose of allotment of an equal share of said lands to the citizens of the tribe entitled to the same. For this purpose an enrollment is being made of all persons entitled by law to participate in the distribution of the lands of the Cherokee people. Between three and four thousand white persons, citizens of the United States and foreigners, who have intermarried with Cherokee citizens by blood, are claiming now that they are entitled to be enrolled for participation in the common property of the Cherokee people, and the right of such enrollment is earnestly denied on the part of the Cherokees by blood, and the Cherokee nation acting through its principal chief.

The question involved in this controversy was on February 24, 1903, referred by the Secretary of the Interior to the Court of Claims for its Findings and Opinion in accordance with Sec. 2, Act of March 3, 1883, (22 Stat. p. 485).

By Act of Congress March 3, 1905 (Rec. 36), the Court of Claims was authorized and empowered to render final judgment in the case, and the privilege was given to either party to appeal to this Court within thirty days from the filing of said judgment. On May 15, 1905, the Court of Claims filed its opinion in this case (R. p. 35), and May 18, 1905, filed the decree of the Court (R. p. 61), by which it was adjudged and decreed that the intermarried white persons residing in the Cherokee Nation who were married to Cherokees by blood prior to Novem-

ber 1, 1875, are entitled to share in the lands constituting the public domain of the nation and are entitled to be enrolled for that purpose, but that such intermarried persons acquired no rights in the funds belonging to the nation, except such as were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed by the United States by patent of December, 1838, and that all citizens who intermarried with Cherokees subsequent to November 1, 1875, acquired no rights in Cherokee property, are not entitled to participate in the distribution thereof, or to be enrolled for such purpose. On June 5, 1905, the Cherokee citizens by blood appealed to this Court from so much of the decree of the Court of Claims as adjudged that persons intermarrying with Cherokee citizens prior to November 1, 1875, were entitled to share in the Cherokee property and on June 7, 1905, the Cherokee Nation filed a similar appeal. On June 8, 1905, certain intermarried whites appealed from the decision of the Court of Claims, except that portion which held that the whites who intermarried prior to November 1, 1875, were entitled to share, and on June 15, 1905, other intermarried whites appealed from the judgment and decree of said Court without limitation. On June 20, 1905, these several appeals were allowed. (R. pp. 63, 64, 65, 66).

POINTS AND AUTHORITIES.

Cherokee lands and funds naturally belong to Cherokee people, and if white men set up a claim to either of these or to any part of them, it is incumbent upon the whites to show clearly the gift, grant, bargain or sale executed under proper authority by which the title to the property of the Cherokees or any part of it has passed out of them and into the whites.

We deny that any such transfer has been made or that the whites have any right whatsoever to any part of the Cherokee lands or funds.

In examining the claim of the intermarried whites now for the first time made, to be considered as members of the Cherokee Nation and enrolled as distributees of the Cherokee property, we must constantly keep in mind the unchanging policy of the Government of the United States, which from the beginning to the present day has endeavored to keep and maintain the Indians as a separate and distinct people, as also the policy of the Indians to keep themselves separate and distinct from the whites, all of which is shown, not only by the statutes of the United States and the Cherokee Nation, but by the practical fact that the Indians, who originally inhabited the eastern part of the United States, have been continually moved westward, even beyond the great Mississippi river, where it was supposed the white man would never disturb them.

In view of this unvarying policy of the two Governments, it is hardly possible to conceive of an Indian tribe like the Cherokees inviting the white man to become permanent members of the tribe, and incorporating them therein with all the rights and privileges of native Cherokees. No such right can be given as a mere matter of inference in the face of the well-defined plan of both nations. It must be declared in words which cannot be misunderstood in order to overcome this general policy and the presumption which necessarily arises from it. The claimants must produce something stronger than a simple Act of Council relating to intermarriage before they can lay claim to rights and privileges denied by the whole history of these two Governments.

Acts of Congress.

The several Acts of Congress establishing the Dawes Commission, and laying down the rules for its guidance, when taken as a whole, evince a well defined purpose upon the part of Congress to allot the Cherokee lands and divide their funds amongst the Cherokee Indians and those persons who by treaty stipulations had been embodied with the nation and accorded all the rights of native Cherokees.

The Act of Congress of March 3, 1893, creating the Dawes Commission requires the Commission to allot the lands amongst the "Indians." (27 Stats., p. 645, Sec. 16, March 3, 1893).

The Act of March 2, 1895, (28 Stat. p. 939), provides for continuing the work of the Dawes Commission, but does not in any way alter the law as to the allotment of lands to the Indians.

The Act of June 10, 1896, (25 Stat. p. 339), requires the Commission to respect all the laws, customs and treaties of the several tribes not inconsistent with the laws of the United States.

The Act of June 7, 1897, (30 Stat. p. 84), defines what was meant by the words "rolls of citizenship" in the previous Act, but does not change the general purpose of the Acts theretofore passed.

The Act approved June 28, 1898, Sec. 21, (30 Stat. p. 502) apparently makes decided changes in the previous enactments of Congress.

This statute may be construed in two ways, to wit: 1st. Keeping in view the object which Congress had, to wit: to allot the Cherokee property amongst the Cherokee citizens entitled to it by law. 2d. Literally, without regard to the purpose of this or the other Acts of Congress.

We contend that the Section is to be construed as a part

of a body or system of laws, keeping in view the manifest purpose of Congress to divide this property fairly and justly between the persons legally entitled to it, so that when the Act confirms this roll of 1880 and requires the enrollment of all persons whose names are found on said roll, it meant to confirm not only the names of the persons upon said roll, but the descriptive matter which under the Cherokee law was set opposite the name of each person enrolled, showing whether he or she was a citizen at all and if so, what kind of citizenship he enjoyed, thereby determining whether or no it was a citizenship which entitled the person to property rights or not. For it must be remembered that the Act of the Cherokee Council, under which the enrollment of 1880 was made required that the returns should show the names of all whites entitled by law to citizenship, all not so entitled, all colored persons entitled by law to citizenship, all not so entitled and all Indians not so entitled, together with many other things. (R. p. 59). That is a reasonable and just construction of the Act, and leads to no injustice. Evidently the purpose of Congress was to confirm the roll of 1880 only in so far as was proper to carry out the object of this and former acts of Congress relating to enrollment of Cherokee Citizens entitled to property rights.

Whatever may be said, however, as to that, it is clear that the intermarried whites can make no claim under Section 21 of the Act of 1898, for after confirming the roll of 1880, the same Section goes on to say that the Dawes Commission shall enroll certain designated persons "with such intermarried white persons as may be entitled to citizenship under Cherokee laws." It is evident from this that all whites intermarried are not to be enrolled, although they all enjoy a certain kind of citizenship when they intermarry a Cherokee citizen. The enrollment is confined

to *such* intermarried white persons as *may be entitled* to citizenship under Cherokee laws. What kind of citizenship? Evidently the citizenship which, according to Cherokee laws, meets the purposes of this Act of Congress, *i. e.*, the citizenship which entitles such persons, to participate in Cherokee property under Cherokee laws. This special provision of the Section relating to intermarried whites, under all rules of construction, takes them out from the general provision, confirming the roll of 1880, and specifically designates which class of intermarried citizens is to be enrolled.

If the Act be given a literal construction, it leads to the most absurd results.

The Section provides that in "making rolls of citizenship of the *several tribes*," the Commission shall take the roll of Cherokee citizens of 1880, (not including freedmen), as the only roll intended to be confirmed by this and previous Acts of Congress. It will be noted that this provision relates not solely to the Cherokees, but to the "rolls of citizenship of the *several tribes*," so that by this part of the Section, the Cherokee roll of 1880 is constituted the only one of all the rolls of any of the Five Civilized Tribes that was intended by Congress to be confirmed, either by this or by any preceding Act.

No reason is given why the other rolls of the various tribes should have been cast aside, and this single roll of 1880 made to do duty not only for the Cherokees, but for all the other tribes as well, not one of whose members appear upon said roll.

This Section 21 further directs the Commission to "enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll of persons whose names are found thereon." This embraces all descendants whether living or dead. It further embraces (1) all intermarried white persons who have used the inter-

course laws in the prosecution of a Cherokee Indian; (2) every intermarried white who being left a widower has married a person not of Cherokee blood, (3) intermarried whites who have abandoned their wives, notwithstanding that the Cherokee law expressly provides that all such persons shall forfeit all claim and right of citizenship.

The Section will thus be made to embrace the descendants of those who have forfeited their rights, even though such descendants have not a particle of Cherokee blood in them.

The Act of May 31, 1900, (31 Stat. p. 236), directed the Commission to continue to exercise the authority theretofore given them, but expressly limited their authority by the proviso that they should neither receive, consider or make record of any application of any person for enrollment as a member of any tribe who had not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such. This, of course, excluded all descendants of Cherokee Indians or other citizens, whose parents had been properly enrolled or who had been admitted to citizenship and recognized in that capacity.

When the time came to put these laws into execution, it was evidently discovered that they were so confused and uncertain that Congress in its next enactment upon the subject reiterated in express terms its original plan and purpose of respecting the laws, customs and treaties of the Cherokees, and enacted the laws of July 1, 1902, under which the enrollment is now finally being made.

By Sections 25 to 28, (32 Stat. p. 720), it is provided as follows, to wit:

"Sec. 25. The roll of the citizens of the Cherokee Nation shall be made as of September 1, 1902, and the names of the persons then living and *entitled to enrollment on that date* shall be placed on the roll."

Section 26 provides that the names of all persons living on September 1, 1902, "entitled to be enrolled as provided in Section 25 hereof shall be placed upon the roll." Section 28 forbids the enrollment of any person who has been enrolled as a citizen of any other tribe. Section 27 then proceeds to say that in all other respects the enrollment shall be made in accordance with Section 21 of the Acts of June 28, 1898, and May 31, 1900.

The result therefore is that before any applicant can be enrolled as a Cherokee under the terms of this last and controlling Act of Congress he must meet these several requirements, to wit:

1. He must be living September 1, 1902.

2. He must be entitled to enrollment on that date.

3. He must not have been enrolled in another tribe.

4. He must be a recognized citizen of the tribe and duly and lawfully enrolled or admitted as such. (Act of May 31, 1900).

He must meet not one, nor two, nor three of these requirements, but all of them.

Manifestly therefore an applicant might be a recognized citizen of the tribe and lawfully enrolled or admitted as such, but he could not be enrolled by the Dawes Commission for the participation in the property of the Cherokee people unless he was living September 1, 1902, had not been enrolled with another tribe and was "entitled to enrollment on that date."

The question then is "who is entitled to enrollment?" That is answered by examining the Cherokee laws and treaties to ascertain who was entitled to participate in the distribution of the lands and funds of the Cherokee people on September 1, 1902.

Such an examination will show that the only persons who are legally entitled to enrollment besides the native Cherokees are the Delawares and the Shawnees. The first derive their right and title under and by virtue of the treaty between the Delawares and the Cherokee Nation with the assent and approval of the United States under date of the 8th day of April, 1867, and the second derive their right and title under and by virtue of the treaty of the 9th day of June, 1869, between the Shawnees and the Cherokee Nation with the consent and approval of the United States.

To securely induct the Delawares into the full rights of native Cherokees the treaty of the 19th day of July, 1866, between the United States and the Cherokee Nation was entered into in solemn form providing for the location of friendly Indians upon the lands of the Cherokees. This was followed by regularly registering all the Delawares by name who desired to remove from Kansas to the Indian country, and at the same time the number of the Cherokees was taken; the value of the lands and funds of the Cherokees was estimated and the amount was determined that the Delawares would fairly and justly pay into the common fund of the Cherokees as purchase price of a per capita interest in the Cherokee lands and funds, and this amount was actually paid by the Delawares. All these things were fully set forth and agreed to in writing by the head men of the two nations with the assent and approval of the United States and the same was executed with all the formalities of a treaty.

Practically the same steps were taken with reference to the Shawnees when they became citizens of the Cherokee Nation.

In behalf of the white men no agreement, contract or treaty of any sort has ever been made. No account of their number has ever been taken. They have contributed nothing whatever to the common fund of the Cherokee Nation. Their claim is based upon an Act of the Cherokee Council permitting intermarriage between white persons and Cherokees in which they are spoken of as citizens by intermarriage.

If the Cherokee National Council was clothed with authority to admit citizens to the nation with the full rights of native Cherokees, what necessity was there for the expenditure of time, labor and means in preparing and executing the treaties under which the Delawares and Shawnees were admitted to the nation?

The restriction placed upon the power of the Council in reference to admission to citizenship in the first article of the Cherokee Constitution fully answers the above question. (Cherokee Constitution, Art. 1, Par. 2).

If the Delawares and Shawnees were required to pay in full for their property rights in the nation, on what principle of justice can it be expected that the whites shall receive what they never paid for? Curious to say, if the intermarried whites are successful in their effort to force themselves on the roll now being prepared for distribution of the Cherokee property, they will each take not only a full share of the original Cherokee property, but also their proportionate amount, according to numbers, of the very money the Delawares and Shawnees have paid into the common treasury for the purpose of securing what the intermarried whites will receive without paying anything.

As shown by the preamble to the Act relating to the intermarriage of whites, the purpose of the enactment was purely administrative, to subject the intermarried

whites to the control and dominion of the Cherokee laws.

The terms of the United States statutes were such that a white man, a citizen of the United States, could marry an Indian woman and live in the Indian country, and be responsible solely to the laws and authorities of the government of the United States, disregarding entirely the laws of the land in which he lived. To meet this condition and secure control over these white citizens, the Cherokees passed the laws relating to intermarriage of whites, and now to the astonishment of everyone, these same white men rise up and declare that the law which was passed solely for the purpose of controlling them, really contains a grant of lands and funds to them, greater in amount than that of either the Delawares or Shawnees. And while these two last classes paid for their shares, respectively, the white men paid nothing. Their share, they declare, is to be a gift pure and simple, and to be all clear gain. They are to have not only a share of the original Cherokee property but also a part of the sums paid by the Delawares and Shawnees.

When the treaty of 1867, between the Cherokees and Delawares was about to be executed, the membership of both nations was enumerated and their numbers set out officially. (193 U. S. 131). No proof has been offered and no pretense made that the white men were then counted amongst the Cherokees, although the amendments to the Constitution had then been made and the intermarriage laws for white men had been many years on the statute book. Neither were the whites counted when the treaty was made with the Shawnees. It was greatly to the interest of the Cherokees to make their numbers as large as possible but even this temptation did not lead them into supposing that the whites were to be counted as citizens entitled to any share in the common property.

Doubts have been expressed whether the amendments to the Cherokee Constitution of Dec. 7, 1866, were legally adopted. In no other part of the Constitution are white persons mentioned at all. Assuming for the present that these amendments are properly a part of the Constitution, we find that there are various classes of persons made citizens of the Cherokee Nation, each being admitted upon different conditions.

Section 5 of Article 3 of the amendments provides for four different conditions, under which persons may be taken and held to be citizens of the Cherokee Nation, to wit:

1st. Native born Cherokees.

2d. All Indians.

3d. Whites, "legally members of the nation by adoption."

4th. Freedmen.

This article of the Constitution simply declares who should at that time be taken and held to be citizens of the Cherokee Nation, and provides that the future citizenship shall consist of the descendants of one or the other of these four classes at that time declared to be citizens.

The condition therefore, under which any white man may be legally a citizen of the nation is not that he is intermarried with a Cherokee, or that the National Council has tried to adopt him into the nation by the passage of an Act to that effect, but he can be a citizen only on condition that he was on December 7, 1866, "legally a member of the nation by adoption," or is descended from one who was.

Which of the three departments into which the Cherokee government is divided by the Constitution—legislative, executive and judicial—has been granted by the Constitution the power of legally adopting new white citizens?

The only authority under the Constitution of the Cherokee Nation, referring to the admission of anyone to citizenship is the clause declaring that the National Council shall have power to *readmit* by law to "all the rights of citizenship" any person who has removed with his effects out of the limits of the nation, and who desires to return to the nation and memorializes the National Council for such readmission (Constitution, Art. I, Sec. 2).

It is manifest, therefore, "that all the rights of citizenship" cannot be granted by the National Council to any persons except former citizens, and then only upon the terms and conditions above set forth, and any effort to admit any other persons is illegal, and must be null and void. Whatever limited rights, therefore, the intermarried whites may have obtained by the fact of marrying a Cherokee woman are not "all the rights of citizenship."

The proper and just limit to the rights of an intermarried white man are well defined by the preamble to the Act regulating the intermarriage with a Cherokee woman, of October 15, 1855, which declares:

> "Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons who may from time to time be privileged to reside within the territorial limits of this nation, therefore, every white man * * * desiring to marry a Cherokee woman" * * *

The same purpose is declared in this identical language in every Act passed on the subject. (R. pp. 10, 15, 16, 20). Showing that the purpose of the Act was simply to secure jurisdiction over the intermarried whites and the National Council may have had authority to pass a law of this character for administrative purposes only.

These several Statutes passed for the express purpose of securing jurisdiction by the Cherokee government over the persons who may from time to time be privileged to reside within the territorial limits of the nation, were evidently enacted in pursuance of the authority granted by a treaty with the United States, which empowered the Cherokees to pass all laws necessary for the government of their own people, and "such persons as have connected themselves with them." (Treaty of 1835, Sec. 5).

An examination of the Cherokee law of 1855, relating to Intermarriage (R. 50) fails to show the slightest indication of purpose upon the part of the National Council to grant any property rights of any kind to intermarried whites. On the other hand the Act of December 5, 1874, which became effective November 1, 1875, does provide that the rights and privileges conferred thereby shall extend to a right of soil and interest in the vested funds of the nation only upon the payment of the sum of $500.

How can it be said that the Act of 1855, is of exactly the same purport and effect as the Act of December 5, 1874, when the latter expressly grants a right to the soil and vested funds of the nation, and the former does not even mention or allude to the subject?

On November 28, 1877, the National Council adopted an amendment striking from the law, all right of intermarrying whites to acquire any interest in the soil or vested funds, and left in full force that section of the Act expressly declaring that the rights and privileges therein conferred shall not extend to right of soil or interest in the vested funds of the nation and that has continued to be the law ever since. (R. 52). If the Cherokees, constituting one of the Five Civilized Nations of Indians, understand the use of language at all, it is asking the Court to go a long way in behalf of these intermarried whites to decree not-

withstanding this express and emphatic provision, that the whites intermarrying subsequent to November 1, 1875, did acquire right of soil and interest in the vested funds. It is safe to say that if any legislature in any State of the Union or the Congress had placed these words in a public Act, there is not a court in this country that would decree that the legislative body meant the very opposite of what it enacted and that in spite of the fact that certain rights are forbidden, they have nevertheless been conferred. It is upon such a condition of the Statute law of the Cherokee Nation that the alleged grant of property rights to the white man is based.

It must be equally clear that persons who married prior to December 5, 1874, acquired no rights of property because no grant is made to them by any Act, or by any treaty as required by Sec. 2116, U. S. Rev. Stats.

That there was a great difference between the classes of citizens, not only as to their mode of entrance into the nation, but as to the extent of their rights is manifest from reading the Acts of the Cherokee Council and the treaties made by the nation. The "Act for the Intermarriage of Whites and Foreigners" begins with the preamble above cited, which sets a limit to the purpose of the Act itself and of the rights granted thereby.

Intermarriage citizenship of the whites is restricted in various ways not applicable to other classes of citizens.

1. His rights of citizenship arise only out of marriage with a Cherokee by blood, and not by adoption; 2. He can't marry without a certificate of good moral character; 3. He must pay both to the clerk and to the nation for his certificate; 4. He must subscribe to a special oath; 5. The certificate of his marriage must be recorded; 6. He can't sign a certificate for another party, desiring to intermarry; 7. Using the intercourse laws, forfeits his rights as a citi-

zen; 8. Being a widower, if he marries a woman not a Cherokee by blood, his citizenship rights are forfeited; 9. If he abandons his wife, all the rights are forfeited. 10. By Act of Cherokee Council of Dec. 6, 1890, Cherokee Courts were empowered to declare the rights of a white man wholly forfeited. (R. 55.)

When the Cherokee Council undertook to admit intermarried whites not alone to citizenship but also to property rights in the nation, they provided by the new Code of Laws passed December 5, 1874, that every such intermarried white should pay into the treasury $500 "in which case he shall be deemed a Cherokee to all intents and be entitled to all the rights of other Cherokees." This is a very different thing from saying that an intermarried white shall be a "Cherokee citizen," which is all that any other Act of the Council relating to this subject undertook to do. This grant of Cherokee citizenship practically meant that such white persons were permitted to reside within the nation, be subject to its laws, but be free from the laws relating to intruders.

The privilege of paying $500 into the treasury of the Cherokees and becoming thereby entitled to all the rights of other Cherokees existed only from November 1, 1875, to November 28, 1877, *i. e.* only until a new election was held by the people, and immediately after this expression of the public will the law granting property rights to intermarried whites was repealed by the National Council and from that day until the present, the Statutes of the Cherokees have expressly declared that the rights of citizenship conferred by the Acts relating to intermarriage of whites, "shall not extend to right of soil or interest in the vested funds of the nation."

Whatever may or may not be the rights acquired by white men who intermarried with Cherokees by blood, there

can be no question that since the passage of the Act of the Cherokee Council of Nov. 28, 1877, no property rights have been acquired or could be acquired by intermarriage with a Cherokee citizen. No discussion can make it any clearer than the Act as amended does, that intermarriage between a white person and a Cherokee gives to the former no rights of property of any kind or character in the Cherokee lands or funds.

In the Act relating to the intermarriage of Cherokees with other Indians, not one of these restrictions are placed upon the rights of the Indian. The Act provides that the marriage shall be contracted according to the law regulating marriages between "our own citizens" and it is declared that such Indian "shall be and is hereby deemed a Cherokee to all intents and purposes and entitled to the rights of other Cherokees." (Comp. 1892, Sec. 670).

Whether the Act relating to intermarriage of other Indians is constitutional is extremely doubtful, but it serves one good purpose in showing by contrast the difference which the Cherokees intended to establish between the intermarried whites and the intermarried Indians. In the latter instance, they were to be "deemed Cherokees to all intents and purposes and entitled to the rights of other Cherokees." The Counsel has produced no such language from the Act relating to intermarried whites, and the Court will search in vain for that or any other expression of the same purport. It must be remembered also that whil the Statutes of the Cherokee Nation, and of the United States exclude in every way practicable the coming of the white man into the Cherokee Nation, that no such inhibition was placed upon the Indians of other tribes.

The Treaty of July 19, 1866, between the Cherokee Nation and the United States provides as to the former slaves that they shall be free and they "and their

descendants shall have all the rights of *native* Cherokees." Ariticle 15 of the same treaty, after providing for the settlement of friendly Indians amongst the Cherokees and the manner in which the latter shall be paid therefor, then stipulates "that they shall be incorporated into and thereafter remain a part of the Cherokee Nation on *equal terms* in every respect with *native Cherokees.*" When the Delawares were about to be moved into the Cherokee country as friendly Indians, it was stipulated in the agreement that "on the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become *members* of the Cherokee Nation, with the *same rights and immunities* and the same participation (and no other) in the national funds as *native Cherokees* * * * and the children thereafter born of such Delawares so incorporated into the Cherokee Nation shall *in all respects be regarded as native Cherokees.*" Two years later when an agreement was made with the Shawnees, after the amount of money to be paid was provided for the rights of Shawnees were defined as follows: "and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms *in every respect* and with all the privileges and immunities of native citizens of said nation."

We submit therefore, that the intermarriage of a white man with a Cherokee woman is in itself very far from giving to the intermarried whites the same rights and interests as if he had been born a member of the Cherokee Nation. This difference in citizenship is easily explained. First, the Cherokees were naturally suspicious and afraid of the whites, as is clearly manifested by the numerous precautions taken in the Act relating to the intermarriage of the whites; second, the white people paid nothing for their entrance as citizens of the nation, while the Shawnees and

Delawares paid a sum then ascertained to be a full per capita share of the value of the lands and funds belonging to the nation.

That the intermarried whites did not become citizens of the Cherokee Nation in the full sense in which foreigners become citizens of the United States when they become naturalized, is shown by the different form of oath taken under the laws of the Cherokees. (Laws of 1892, p. 331), and the oath of allegiance taken to the United States (Rev. Stat. p. 380, Sec. 2165). In the former, the party swears to honor, defend and submit to the Cherokee laws and Constitution, and declares that he will seek no protection from any government incompatible with the protection and privileges guaranteed to the Cherokee Nation by the United States in treaty stipulations; in the latter, the new citizen swears allegiance to the United States and abjures all allegiance to any foreign potentate on earth, and especially as to the country or king of which he was a citizen or subject.

The Acts of the Cherokee Council readmitting A. G. Greenway and his two children, and David N. Allen and his family, show clearly the distinction drawn by the National Council between an intermarried white citizen and those who are citizens by Cherokee blood. (R. p. 57).

Other Indian Treaties.

Each of the five civilized tribes made treaties with the United States in 1866, and the United States was represented by the same Commissioners in each case. In the treaty with the Chocktaws and Chickasaws, rights of property and citizenship were given to white persons by treaty with the full assent of the United States. In none of the other treaties with the other tribes were any such rights granted and no pretense is made upon the part of

the whites in the other tribes that they have any rights of property. This action upon the part of the contracting parties is a clear contemporaneous construction of the words, "legally members of the nation by adoption." It means those who are adopted by treaty stipulations between the United States and the Nation of Indians.

That the whites were purposely not included cannot be doubted when we inquire into the circumstances surrounding the making of the Treaty of 1866 (p. 152, 30 Ct. Cls.). Besides the Cherokees, representatives of the Creeks, Chocktaws, Chickasaws, Seminoles and other tribes were all gathered at Fort Smith, Arkansas, at the instance of the United States and all at the same time and for the same purpose. Practically similar conditions were proposed for all of these tribes, and the United States was represented by the same Commissioners empowered to make treaties with each tribe. No mention is made of the adopted or intermarried white men in any of the treaties except that with the Chocktaws and Chickasaws. The Chocktaws and Chickasaws, however, in addition to admitting friendly Indians upon an equality with native citizens, after providing for the occupation and selection of the lands by members of the tribe agreed. (Article XXVI.)

> "The right here given to the Chocktaws and Chickasaws respectively shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such."

And further provide for the rights of the intermarried whites in said nation as agreed. (Article XXXVIII.)

> "Every white person who, having married a Chocktaw or Chickasaw, resides in the Chocktaw or Chicasaw Nation, or who has been adopted by legislative authorities, is to be deemed a member of said nation,

> and shall be subject to the laws of the Chocktaw and Chickasaw Nation according to his domicile and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Chocktaw or Chickasaw."

These quotations show that the Indians provided for property rights in one paragraph of the treaty and for political rights in another, demonstrating beyond question that neither one of these embraces the other; further they show that in the Indian mind there was a distinction between an adopted citizen and an intermarried white person, otherwise it would have been useless to mention both of these classes in each of these paragraphs, and it further shows that in the estimation of the Indians and the Commissioners representing the United States the proper and legal mode of granting any share or portion of property of the Indian tribe to an alien was by treaty stipulation between the Indians and the Government of the United States.

Further provision is made in this treaty not only for those persons who were either adopted or intermarried into the tribe, but also for those who should thereafter come into the tribe by either process, showing that when the Indians intended to increase their citizenship by the admission of white men at a future day, they had sense enough to put it into the treaty. If the Cherokees had ever intended that their Constitution should apply to adopted whites thereafter coming into the Nation, they would have said so, and if they had intended that intermarried person should acquire property rights they would have said so, for no one will pretend that the Cherokees were a less intelligent people than the Chocktaws or Chickasaws. The fact is that the Cherokees constitute the most intelligent of all civilized tribes.

> "A charter intended to convey political power only would never contain the words expressly granting the land, the soil and the waters." *Johnson* vs. *McIntosh*, 8 Wheat., p. 543.

The converse of this proposition is equally true that an Act of the National Council of the Cherokees would have included a grant of land and share in the funds if the Cherokees had intended such to be the case.

Different Classes of Citizens.

It is not at all unusual to find a distinction between the rights and privileges of different classes of citizens of the same State or nation. This is recognized by the Cherokees by the difference between their intermarriage law for the whites and that for the Indians of other tribes hereinbefore set out. This is emphasized in the intermarriage law for the whites by the provision that a white man intermarrying with an Indian by blood acquires certain rights as a citizen, but there is no provision that if he marries a Cherokee citizen, not of Indian blood, that he shall acquire any rights or be regarded as a citizen at all, and further by the provision that if once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen.

The distinction between citizens as such and citizens with property rights has also been recognized by the Congress of the United States in enacments relating to other Indians than the five civilized tribes. By the Act approved August 9, 1888, 25 Stats., p. 392, and 1st Supp., p. 608, it is provided that a white man marrying an Indian woman (except of the five civilized tribes) shall not acquire any property rights in the tribal property, privilege or interest, and an

Indian woman marrying a citizen of the United States becomes thereby a citizen of the United States with all the rights, privileges and immunities of such citizen, without losing her tribal property or any interest therein; showing clearly a distinction by Congress between citizenship and property rights in Indians.

By the Act of Congress of May 2, 1890, (26th Stats., p. 96), the property of an adopted citizen of any of the five civilized tribes, in the form of improvements upon real estate in the Indian Territory, in excess of one hundred and sixty acres, is made subject to the payment of a judgment of the court, and no such provision is made as against members of the tribe, who are not adopted citizens.

By the Act of June 7, 1897, (30th Stats., p. 90), it is provided that the children born of the marriage between a white man and an Indian woman by blood, *and not by adoption*, shall have the same rights to the property of the tribe to which the mother belongs by blood as any other member of the tribe, making the clear distinction between children of a citizen by blood and one by adoption.

In discussing the difference between the rights of different classes of citizens, the Court of Claims in the case of *Whitmire* vs. *The Cherokee Nation*, (30th Court of Claims, p. 152), says "here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country—white men who became citizens by intermarriage;" further the Court, after quoting from the Cherokee law, relating to the intermarriage of whites, says, "the idea, therefore, existed both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the Constitution termed the common property or lands of the Cherokee Nation."

"Rights and immunities" often mean only political rights. Journeycake case, 155 U. S., 212.

In Stephens vs. Cherokee Nation, 174 U. S., 445, 488, Chief Justice Fuller declared. "It may be remarked that the legislation seems to recognize, and especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which a right to a share in the latter would not necessarily follow from the concession of the former." Commenting on this, the Court of Claims says in its opinion in the pending case, "it cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs, or to confer upon the white citizens property which they were not legally entitled to have. The term citizens in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands." (R. 41.)

The fact that the native Cherokees are citizens of the Cherokee Nation and that the whites intermarrying with Cherokees are also called citizens of the nation, by no means indicates that the whites so intermarrying are to enjoy all the rights, privileges and immunities that belong to the native Cherokee citizen.

"Words and phrases are used with different signification and with different shades of meaning in different connections. They are not to be interpreted, invariably, as expressing precisely the same idea in all cases." Beckwith vs. United States (16 Ct. of Cls., 250-262.)

"When that (the meaning of the Statute) can be satisfactorily gathered from the whole language of an Act or Section, taken in connection with the manifest object

designed to be accomplished, it is not necessary to give to every word its exact signification as an independent word, when it would be inconsistent with other words and other parts of the same Statute. "Farden vs. United States, (13 Ct. of Cls. 347-352). Affirmed on appeal, (99 U. S. p. 10).

"The language of a Statute is to be interpreted with reference not only to the general subject to which it relates, but also to the particular matter which the legislature appears to have had in hand, and the object which it seems to have aimed to accomplish, as manifested by other parts of the Act; and words are not always to be restricted to their signification as independent words, but may be qualified by their surroundings and connection." (McLure vs. U. S., 19 Ct. Cls., p. 24.)

In some of the States of the Union women who are citizens are voters, and in other States they are not. In some States educational qualifications and in others property qualifications are required for voters, but this variety in the privilege of citizenship does not alter the fact that all of these people are alike citizens of the commonwealth.

Previous Action of Whites.

At no time in the whole history of the Cherokee Nation has any demand been made by the intermarried whites to participate in the distribution of any money paid out to the Cherokee citizens, including of late years, the Shawnees, Delawares and freedmen, excepting, of course, the "bread money" distributed to all persons, without distinction, to prevent starvation and death. Intermarried whites have drawn money for their wives and children from the public funds and made no complaint that none was paid

to them. (R., p. 57.) They have acquiesced in the intermarriage law, which placed them upon a wholly different footing from that of native Cherokees or intermarried Indians of other tribes. They have seen the Shawnees, Delawares and freedmen apply to the Congress of the United States and secure the enactment of laws permitting them to test their several rights to share in the funds of the Cherokee Nation theretofore distributed, and succeed therein, without making any attempt to do the same themselves; they have brought no action for their proportionate share of any fund, although by the laws of the Cherokee Nation they could have instituted suit at any time against the Nation for the recovery of any money due them; (R. p. 57), and not until the final distribution by the Cherokees of the patrimony of their fathers and the inheritance of their children, have the intermarried whites set up any pretense whatever that they were citizens of the class entitled to share in the lands and funds of the Cherokee people.

The Shawnees, Delawares and freedmen applied to Congress in 1888 and secured an appropriation of $75,000, to be paid to them in lieu of the funds distributed by the Cherokee Nation to Cherokees alone. (25 Stat., p. 608.) The intermarried whites were not mentioned in this Act, and the record gives no evidence of an effort upon their part to be included. This Act of Congress followed the veto message of Bushyhead, Principal Chief, dated May, 18, 1883, makes specific reference to that message and shows the purpose of the Act was to rectify the wrong complained of. This Act therefore is a legislative recognition by the United States of the difference between the rights of the Delawares, Shawnees and freedmen and those of the intermarried whites in the Cherokee Nation, and this construction has been followed by the United States in subsequent

Acts of Congress. The Act of Congress under which the cases of Journeycake, Blackfeather and Whitmire were instituted in the Court of Claims was passed and these cases determined in favor of the claimants, and no effort on the part of the whites to be included is shown in the record.

We confidently assert that if these astute, intelligent and ambitious white men, living in the Cherokee Nation, had any basis whatever for a claim of a part of the lands and funds of the Cherokee Nation, they would have asserted it long before this, and their long inaction and acquiescence in the construction of the Cherokee laws, which excluded them from property rights, is binding upon all parties concerned.

"To get at the purpose and intention of the parties, we have a right to consider the construction the parties to the instrument, and who were affected by it, have given it, and what have been their actions under it" U. S. vs. Payne (2d McCreary, p. 295; 8 Fed., p. 888.)

Previous Decisions of the Court.

In the case of Journeycake (155 U. S., pp. 196, 208), this Court holds that the grant of *equal* rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship. That doctrine was applicable to the Delaware Indians, who obtained all the rights of native Cherokees under treaty with the United States, and by agreement with the Cherokees, but it has no application to the intermarried whites who never were by any treaty, agreement, Act of Congress or of the Cherokee Council, granted equal rights, except two who paid $500 into the Cherokee Treasury during the two years that privilege existed.

Before the Court of Claims it was argued by Counsel for the intermarried whites that the question now in controversy has been already determined. For this purpose, he quoted from the cases of Journeycake and Whitmire and undertook to show that the white men were included in these decisions. He did not point out clearly whether the Court had converted the whites into freedmen, Shawnees or Delawares. They must be turned into one or the other of these, because the rights of each of these classes of citizens depend upon the peculiar facts connected with each class, and the Court laid down no general principle under which other claimants relying upon an entirely separate state of facts would nevertheless be included. What the Court really decided in the Journeycake case it sets forth in its decree (28 Ct. of Cls., p. 319), to wit: that the Delaware Indians were entitled to participate in the lands and funds "in the same manner and to the same extent as Cherokee citizens of *Cherokee blood*," and the point actually determined by the Court in the Whitmire case set forth in the decree (30 Ct. of Cls., p. 193), is that the freedmen are to share in the common property "in the same manner and to the same extent as Cherokee citizens of *Cherokee blood* or parentage." To the same effect is the case of Blackfeather (155 U. S., p. 220).

Evidently in the mind of the Court, the "Cherokee citizen of Cherokee blood" constituted a class with a different measure of rights and privileges from the simple Cherokee citizen, and the Cherokee citizen of Cherokee blood was made the standard by which to determine the property rights of the Delawares, Shawnees and freedmen.

Counsel also quoted before the Court of Claims from the decision of the Supreme Court in the Journeycake case to the effect that if two propositions are given, to wit: (1) that the lands are to be common property of the Cherokee

Nation, and (2) that the registered Delawares have become incorporated into the Cherokee Nation and are members and citizens thereof, it follows necessarily that the Delawares are entitled to share in these lands. That does not fit this case, for as we have shown in this Brief, these lands have ceased to be common property of the Cherokee Nation by action of the National Council in accordance with the Constitution of the Cherokee Nation, and are now divisible amongst the Cherokees; and second, the intermarried whites are not members and citizens thereof, and never have been, in the sense in which the word is used by the Supreme Court.

When we remember that Courts have always held that their decisions are intended to apply only to the case then before them, it cannot be supposed that the Court in the previous cases of the Shawnees, Delawares and freedmen have tied their hands as to the questions involved in the case of the intermarried white men, so that they are not in a position to decide the case of the intermarried whites upon the facts which are now here presented for the first time.

In *Stephens* vs. *Cherokee Nation*, 174 U. S., 445, the Supreme Court holds that Congress has the full power to legislate with reference to the Indian tribes, provided it does not infringe a provision of the Constitution.

It is precisely on account of an infringement of the Constitution prohibiting the taking of private property without due process of law that any legislation of Congress which attempts to engraft the white men into the Cherokee Nation is void and of none effect. It is alleged in the petition and admitted by the answer of the intermarried whites, that, if the white men are enrolled for participation in the Cherokee property it will to that extent diminish the share of each of the Cherokees by

blood and thus take from them property by legislative act, which is not due process of law. If such action by Congress has really been attempted, which we deny, it cannot be said that the Cherokees have agreed to it, for the record discloses the fact that when the vote was taken on the Act of Congress the intermarried whites cast votes in favor of the Act of Congress, largely in excess of the majority given at the polls, and that white men who married into the tribe since 1895 voted at the election in favor of the Act of Congress, although it is conceded on all sides that they had no interest present or prospective in the Cherokee property.

The legislation of Congress relating to the Cherokees can all be easily understood if it is remembered that when speaking of citizens Congress intended to refer to those citizens who had property rights as distinguished from those who had simply political rights. If this view be adopted, no constitutional questions will be raised, and the action of Congress and that of the Cherokee National Council and the decisions of the courts will all be found to be harmonious.

In the case of *Stephens* vs. *The Cherokee Nation* above cited, it was held that the petitioners could not raise certain questions relating to the property, because their right to participate had not been established. In the pending case no such questions can be made, for the pleadings admit the right of the Cherokees by blood to share in the property, and in addition to that the Cherokee Nation as intervenor, of course, has full power to raise any questions connected with the distribution of the property of the Cherokees.

It is most unreasonable to suppose that the United States ever intended that three or four thousand white men should become members of an Indian tribe located upon

land specifically set apart for their use and benefit, and that these white men should thereby become a portion of a dependent domestic nation, located within the boundaries of the United States, over whom the United States would not exercise the same rights and powers that it exercised over all other American citizens, and that these white men by reason of their membership in the Indian tribe should place the United States in the attitude of a guardian for them, holding their funds in the treasury and with whom the United States would constantly deal as if these white men in fact constituted an inferior race.

Cherokee Title to Lands.

The title of the Cherokees to their lands was settled by the Treaty of 1846, which in Article 1, declares: "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit," and the United States agrees to secure and guarantee to them and their *heirs* and successors these lands. Article 4 of the same treaty declares, these lands "shall be and remain the common property of the whole Cherokee people." The Cherokee Constitution, Article 1, Section 2, provides: "the lands of the Cherokee Nation shall remain common property." An amendment to the Constitution of November 26, 1866, Article 1, Section 2, declares the lands of the Cherokee Nation "shall *remain* common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20 of the Treaty of the 19th of July, 1866, between the United States and the Cherokee Nation." The National Council has made this request for the survey and allotment of the Cherokee lands (R. p. 55), and under Article 20 of said Treaty of 1866, these lands are to

be allotted *amongst the Cherokees.* This was a solemn compact between the United States and the Cherokee people, made with all the formalities of a treaty, and we submit that the government has no power or authority to allot these lands to anyone except to the Cherokees and those upon whom they have conferred by treaty stipulations, "all the rights of native Cherokees." At the time the intermarried whites claim to have secured their rights, the title to this land was in the Cherokee people as their common property.

In the case of Journeycake vs. the Cherokees, (28 Ct. of Cls., p. 281), the only question before the Court was the right of the Delawares under the Treaty of 1867, to share in funds arising from the leasing of Cherokee lands west of 96 degrees of longitude. The question of title to the lands, whether held by the nation or the members of the community was not necessarily involved in the case; and the decree rendered by the Court, which, after all, covers the only points decided in the case, does not mention this question. And the Treaty of 1846, above cited, which really declares the character of the Cherokee title, was not even mentioned in the argument and was only incidentally referred to once in the Opinion.

The patent issued in 1838, for the Cherokee lands was in favor of the Cherokee Nation, and as we understand the cases heretofore decided, the Courts in discussing the title of the Cherokees has always referred to this patent as the muniment of their title. On February 28, 1840, John Ross and other Cherokees having full authority from the Cherokee people, submitting their memorial to the President of the United States, made four specific requests, the second of which is as follows: "Establishing a satisfactory definition of the tenure under which they are to hold their lands in the West." On September 20, 1841,

the President of the United States replying to this memorial promised to negotiate with the Cherokees a new treaty, in which not justice merely should be done them, but a liberal and generous course adopted toward them. (This correspondence appears in H. R. No. 288, 27th Congress, 3d Session, p. 49, and in H. R. Doc. No. 316, 25th Congress, 2d Session). This correspondence was followed by the Treaty of 1846, which provided for the granting of another patent for the Cherokee lands, to be issued by the United States, conveying title, of course, to the Cherokees, in accordance with the terms of said treaty, which declared that "the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit." Manifestly, the purpose was to change the character of the tenure, otherwise there would have been no benefit from inserting this provision in the treaty providing for the issuance of a new patent, and at the same time describing in the treaty the character of tenure by which the land was to be held. We submit therefore, that the Treaty of 1846, is the present basis of the Cherokee title, and that under this treaty the Cherokee Nation is not the owner and holder of the Cherokee lands, but that the lands are secured to the whole Cherokee people without reference to their body politic.

Discussing the character of the tenure of the Cherokee lands, the Court of Claims in a recent case says:

> "But in 1835, the lands of the Cherokees east of the Mississippi, and in 1846, the lands of the Cherokees in the Indian Territory, were neither public or private lands in the ordinary sense of those terms. The term 'communal,' it is believed, is not to be found in Treaties or Statutes or public documents relating to the Indians prior to the date of the case of the *Western Cherokees.* (27 Ct. of Cls. p. 1). But

> the officers of the government, * * * have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. Whenever the government has paid for a section of the Indian land *per capita* to every member of an Indian community, share and share alike, it was because the Indians knew that their lands were communal property and that they, as communal owners, were entitled to the purchase money."

In the same case, the Court further holds that:

> "While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate and they have not assumed to hold the title or to be entitled to the puchase money. * * * In the present case, the Cherokee Nation takes the place so far as communal ownership is involved as the chiefs and head men of the uncivilized tribes." Cherokee Nation vs. United States, (40 Ct. of Cls. pp. 325-327).

From this, the last authoritative decision upon the question of the tenure of the Cherokees, it is clear that the Cherokee title to their lands is not in the nation as a body politic. The nation simply holds it in trust for the benefit of all the communal owners. It must be manifest that the nation as trustee has no authority to admit to the enjoyment of the trust property, several thousand white men who have paid nothing for a right or share in the property held in trust.

Whatever may be, however, the Opinion of the Court on this point, one thing is manifest and that is, that the title

was settled by the treaty and by the Constitution of the Cherokee people and we insist that the Cherokee National Council had no authority or control of any kind over the lands or funds of the Cherokee people. The authority of the Cherokee Council was limited solely to the government and control of the citizens, and with that their power ended. Under the Constitution, by Article 3, Section 14, its power was limited to the enactment of laws deemed necessary and proper for the good of the nation, which shall not be contrary to the Constitution. It would have been contrary to the Constitution for the National Council to pass any law relating to the property which the Constitution declared should remain the common property of the Cherokees.

An Act of the Cherokee Council undertaking to dispose in any way of any part of the Cherokee National funds would have found no warrant in the Constitution and would have been utterly null and void. The same thing is true in an equal degree as to the lands of the Cherokees. In fact whatever the Cherokee Council may have done was of no force in view of the Acts of Congress and the decisions of the United States Courts. Section 2116 Revised Statutes declares:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Section 2118:

> "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of $1,000. The President may moreover

take such measure or employ such military force as he may judge necessary to remove any such person from the lands."

By Art. 5, Treaty of 1835, which guarantees the Cherokees the right of self government their power to legislate is specifically limited by the Constitution and laws of the United States.

"The Indian title could not be conveyed by the Indians to anyone but the United States without the consent of the United States." Jones vs. Meeham, 175th U. S., p. 8, and the cases there cited.

"Indians being wards of the nation cannot suspend that relation without the consent of the government." Lowe vs. Kickapoos, 37 Ct. Cls., 413.

The Indian law has always declared that

"No man could be a son of the tribe unless he was a son of the daughter of the tribe." New York Indians vs. U. S., 40 Ct. Cls., 454.

Married out Whites.

A considerable number of persons known as "The married out and abandonment whites" (R. p. 49), also claim that they are entitled to be enrolled for the purpose of receiving a share of the lands and funds of the Cherokee Nation, notwithstanding that they admit that by reason of their own actions, they have under Cherokee law long since ceased to be citizens of the Cherokee Nation. The claim of this class of persons is so completely settled by the Opinion of the Court of Claims (R. 41), that it seems useless to add anything to what that Court has said.

It may be remarked, however, that as an original proposition, so far as either law or justice is concerned, the other class of claimants have no more basis for their demand for a share of the Cherokee property, than have these persons who have openly and notoriously forfeited whatever pretense of claim they ever had.

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K. S. MURCHISON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted].125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

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THE CHEROKEE NATION, APPELLANT,

vs.

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FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

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THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

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REPLY BRIEF ON BEHALF OF CHEROKEE CITIZENS BY BLOOD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Nos. 419, 420, 421, 422.

DANIEL RED BIRD AND OTHERS

vs.

THE UNITED STATES.

Reply Brief on Behalf of Cherokees by Blood.

In our brief filed in behalf of the Cherokees by blood we have insisted that no grant of property rights in the funds or lands of the Cherokee Nation can be shown either from the constitution or laws of the Cherokee Nation, from the treaties between the United States and the Cherokees, or from the statutes of the United States, and that if the Indians are to suffer the loss of their property it must be by the technical construction of some statute of the United States which they never comprehended, and by which it was never intended either by the United States or the Cherokee people that the white men should acquire property rights.

Our position in this matter has been confirmed by the brief filed in behalf of the intermarried whites, which fails utterly to refer the court to any law granting the intermarried whites any property rights whatever or in which such grant is even mentioned.

The brief begins by the statement that the question propounded by the Secretary of the Interior to the court was rather unfair and misleading, and that the real question is whether or not persons claiming rights of citizenship in the Cherokee Nation by intermarriage are entitled to enrollment at all by the Commission to the Five Civilized Tribes under the law set forth in the letter of the Secretary, and that the Secretary has erroneously stated that the real question is whether such citizens are to be enrolled "so as to recognize their rights to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character." The counsel goes so far as to charge that this was evidently suggested and framed by those opposed to the maintaining of any property rights by the whites. This statement is wholly unfounded in fact. It must be assumed that the Secretary of the Interior, after nearly eight years service in his present position, knows what question he desired the Court of Claims to decide, and that he was able to submit it to the court intelligently and without assistance from others. Counsel for the Cherokee Indians did not assist him.

On page 33 the brief declares:

"These people must be enrolled. When enrolled, *we* will then determine what is the effect of the enrollment on property rights."

This bald proposition is equivalent to saying that the court must give these people a deed to Cherokee property, and after that is done we will determine what the effect is.

The brief, as I understand it, calls upon this court to settle an abstract proposition as to the enrollment of certain alleged citizens in the Cherokee Nation and to close its eyes to the purpose of such enrollment. Strange to say, that is denominated the *real question* in the case.

It is probably the first time the court has ever been invited to construe a statute without reference to the purpose for which it was enacted, and it demonstrates the desperate posi-

tion of the counsel when he asks the court to determine this question wholly without reference to the purposes of Congress in enacting the law. I respectfully suggest that if he hopes to win his client's case he should request the court to close its eyes both to the law and its purpose. If the request he makes was possible in any case, it is certainly not so in this. This case arises out of certain questions of law and fact, which the Secretary determined were of such consequence that they ought to be settled by a judicial tribunal and not by an executive department of the Government. The law provides in such cases that the Secretary may refer such controverted questions of fact and law to the Court of Claims for its findings and opinions thereon for his guidance and action (22d Stat., p. 485, sec. 2).

The question, therefore, before this court is settled by the question which the Court of Claims was called upon to determine by the letter of the Secretary. That question is stated by him to be the right of white persons intermarried with Cherokee citizens to enrollment "so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character." That was the question which troubled the Secretary and which he felt should be determined by the Court of Claims, and not the question as to whether white men should have their names placed upon a roll wholly without regard to the purposes for which the enrollment was made. While this question, propounded by the Secretary, was pending before the Court of Claims Congress concluded that it was a case involving such important rights that the Court of Claims should be empowered to render final judgment, and that either party, feeling itself aggrieved by said judgment, should have the right of appeal to this court.

When the Secretary of the Interior was executing a law of Congress, the whole purpose of which was the equal and just distribution of the Cherokee property among the citizens entitled thereto, it would have been absurd to submit to the

Court of Claims a question as to whether certain persons were to be enrolled without informing the court that the purpose of such enrollment was for the carrying out of the act of Congress. It is of no consequence to the Cherokees by blood whether these intermarried whites are put upon a dozen rolls of Cherokee citizens, provided they are not enrolled to share in Cherokee property. They may be enrolled for military purposes, for voting purposes, or for the purpose of counting the number of inhabitants. What we protest against is their enrollment to share in the property for which they have never paid and to which they have no just claim. That is the practical question pending before the Interior Department, which was referred to the Court of Claims, and which this court is called to pass upon.

Second. The counsel quotes (page 11) from the case of the Cherokee Nation *against* Journeycake, 155 U. S., p. 196, as follows:

"But it must be borne in mind that the rights and interests which the native Cherokees had in the reservation and outlet sprang from the citizenship in the Cherokee Nation, *and the grant of equal rights as members of the Cherokee Nation naturally carry with it a grant of all rights springing from citizenship.*"

If the counsel can show that the white people have ever been granted, by proper authority, *equal rights as members of the Cherokee Nation,* it will be worth more to him in this case than his forty-four pages of technical argument upon the question of citizen and citizenship. All the other claimants have been incorporated with the Cherokee people and are able to show the grant of equal rights as members of the Cherokee Nation by treaty with the United States and between said nation and the persons so incorporated. It is the want of this grant of equal rights as *members* of the Cherokee Nation that distinctly distinguishes the white men from all other claimants to this property. That there is a difference intended to be made between a citizen of the Cherokee Nation

O'Brien vs. Miller 168 U. S. p. 287 + 29

U. S. vs. Joseph. 94 U. S. 614 & Pueblo Indi

Canal Co. vs. Hill 15 Wall p. 94.

and a member of the nation is shown by the act of Congress of July 1, 1902 (37 Stat., p. 716), section 7 of which says:

"The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to be members or citizens of the Cherokee Nation, in the Indian Territory."

This does not mean that "member" or "members" and "citizen" or "citizens" shall all be held to mean members of the tribe, but, on the contrary, it declares that the words "member" or "members" mean members of the *Cherokee Nation, in the Indian Territory,* and that the words "citizen" or "citizens" mean citizens of the *Cherokee Nation, in the Indian Territory.* The purpose being to set forth in one section that whenever in the body of the act the word "member" is used, it shall designate a member of the Cherokee Nation without adding these latter words in every section, and that when the words "citizen" or "citizens" are used it shall designate a citizen of the Cherokee Nation without the formality of adding these latter words; but the whole section taken together demonstrates clearly that there is a distinction between a member of the nation and a citizen of the nation. If this had not been the purpose, then all four of the words quoted in the section would have been construed as meaning a member of the nation, when in fact it declares that two of them shall mean member and two of them shall mean citizen, and that consequently these two words mean different things.

On page 10 the counsel quotes from section 21 (30 Stat., pp. 502-503) to the effect that the Dawes Commission are to enroll

"such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the *treaties* and *laws* of said tribes,"

and claims that that provision is identical with that for the Cherokees in the same section as follows:

"with such intermarried white persons as may be entitled to citizenship under Cherokee laws."

He omitted to quote the Choctaw and Chickasaw treaty, which, after providing for the selection of lands by members of the tribe, agreed that—

"The right here given to the Choctaw and Chickasaws respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such."

If the intermarried whites in the Cherokee Nation can produce a grant to them of this character by treaty with the Cherokees, then the cases will be similar; otherwise there still remains the difference between them that one has a right granted by the owners of the property by solemn treaty, whereas the others are simply claimants because they possess a certain limited citizenship by marriage.

He further quotes from the same section 21 as follows:

"The roll so made when approved by the Secretary of the Interior, shall be filed and the persons whose names are found thereon, with their descendants thereafter born to them, *with such persons as may intermarry according to tribal laws shall alone constitute the several tribes which they represent.*"

This, of course, can have no application to the Cherokees, for the act of the Cherokee council approved December 16, 1895, as also the previous act of November 28, 1877, denying all property rights to intermarried whites, were both in force when the act of Congress was passed.

On page 11 of his brief counsel quotes section 26, act of July 1, 1902 (32 Stat., p. 720), which declares that no white persons intermarried since December 16, 1895, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation. He follows that with the act of the Cherokee council to the same effect, approved December 16, 1895.

He quotes also from Whitmire *vs.* Cherokee Nation (30 Court of Claims, p. 187), which specifically holds that—

"The court does not intend to express an opinion concerning the constitutional rights of these adopted citizens in the common property of the Cherokee Nation,"

which wholly excludes the intermarried whites from the effect of that decision. He then declares that the above act of Congress unmistakably shows that there was a class of persons who, having married prior to December 16, 1895, were to be enrolled, *embracing all lawfully married according to the laws of the nation,* and were to participate in the distribution of the tribal property of the Cherokee Nation. This is what may be termed a grant of land by back action. Not a single word of the act, either directly or remotely, says that these intermarried persons have or are to have any interest in the property of the nation. On the same theory, if Congress should pass an act declaring that it should be unlawful for any person to take and carry away the furniture in the rooms of the Supreme Court of the United States after the date of the act, it would then have committed itself to the proposition that prior to that time it was perfectly lawful and proper for any one to take and carry away the furniture from the Supreme Court rooms.

Some years ago a measure was submitted to Congress providing for the protection of the President of the United States against assault or personal injury. According to the theory of the counsel, Congress thereby committed itself to the monstrous proposition that prior to that date it was perfectly legal and proper to make an unwarranted assault upon the person of the President.

But even if this act of the Cherokee council should have a reactionary effect, it does not necessarily follow that, because it declares that all non-citizens thereafter marrying should acquire no property rights, therefore *all* who married prior thereto actually acquired property rights. It would be properly limited under any circumstances to those who between 1875 and 1877 acquired property rights under the provisions of the law then in existence, which empowered

them to do so by the payment of $500, and would leave out all others who had failed within the time limited above to take advantage of that opportunity. The denial of *any* property rights does not imply the former possession of *all* such rights, even if any implication at all is possible.

The question of property rights had never been in any way raised by the intermarried whites, and hence the errors in the compiled laws had not been called to public attention, nor had any questions involving their construction been brought in the courts by white persons claiming rights in Cherokee property. Under these laws the whites had never at any time claimed any of the funds paid out to the Cherokee, Delaware, and Shawnee citizens, constituting a number of different payments, and amounting to millions of dollars. As no Cherokee ever supposed that property rights had been granted to the intermarried whites, and as none of these intermarried citizens had in the whole history of the Cherokee Nation laid claim to such rights, the contingency of such a claim had never been brought forward for a decision. As soon, however, as the intimation by the Court of Claims in the Whitmire case became known, to the effect that the intermarried whites might have some claim to property rights, the Cherokee council immediately passed the act of December 16, 1895.

When the Court of Claims in the Whitmire case let drop some expressions which indicated that the white men might be, not only citizens, but possibly members of the nation, the Cherokee national council passed the act approved December 16, 1895, amending chapter XII, article XVI, sections 659 to 669 of the *Compiled Laws* of the Cherokee Nation, which had erroneously omitted from the compilation that provision of the previous act which had distinctly stated that intermarriage should confer no right of property in the Cherokee Nation. By act of November —, 1877, they had amended the original statute relating to intermarriage so as to deny intermarrying whites any right in Cherokee prop-

erty, and by the act approved December 16, 1895, they amended the compiled statutes which by reason of the errors in it had misled the Court of Claims into the erroneous theory that the white men might possibly be entitled to property rights. The truth of the situation, therefore, is that the Cherokee council has both amended the law itself and the compilation of the law, thereby evincing an unalterable determination to prevent the encroachment of the whites upon the property rights of the Cherokee people.

After quoting from the compilation of the Cherokee laws those sections relating to intermarriage of white citizens, counsel, at the bottom of page 25 of his brief, asserts:

"All citizens who married under the law as contained in these two compilations, are entitled to citizenship under Cherokee law, for that was the law until the enactment of the act above mentioned, on the 16th day of December, 1895, after which time the agreement says that no intermarried citizen shall be enrolled."

The act of the Cherokee council above quoted does not pretend to deny citizenship to the whites who married subsequent to the date of its approval; it simply declares that no property rights shall follow such marriage, and amends the compiled laws of the Cherokee Nation so as to conform to the amendment to the original statute, which amendment had been adopted November 28, 1877. Again may it be said that if under these sections of the compiled laws quoted by the counsel all intermarried citizens were entitled to citizenship under Cherokee laws, why was it that Congress limited the enrollment by section 21 of the act of 1898 (30 Stat., p. 495) to only "such intermarried white persons as may be entitled to citizenship under Cherokee laws"? All intermarried whites are citizens of a certain class, but only those that may have acquired property rights, if any, are such citizens as the law requires to be enrolled.

That there is more than one class of citizens in the Cherokee Nation is demonstrated by the law quoted by the counsel

for the intermarried whites. The act of December 16, 1895, denies property rights, but leaves the whites marrying subsequently citizens of the nation, and, according to the contention of the counsel, those married prior to that date have property rights and those marrying since that date have no property rights, showing clearly that by his own contention there are two classes of citizens in the Cherokee Nation. The only question, therefore, is, When did the right to Cherokee property, if it ever existed, cease to follow the intermarriage of a white person with a Cherokee woman? Did it cease when the original act granting such right was amended, November 28, 1877, or did it cease only when the council also amended the compilation of laws, December 16, 1895?

On page 27 counsel quotes as follows:

"That any white man who shall lawfully marry under the provisions of this act, and then, or afterwards abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation."

He draws the conclusion that the converse of the last proposition must, of course, be true, that so long as he remained faithful to his wife he would be entitled to all the rights and privileges of a citizen of the Cherokee Nation. This is another alleged grant by contraries. This new doctrine that the denial of a right is really the grant of a right is not supported by any authority from any source whatsoever. It is probably asserted here for the first time in the history of legal proceedings, and is evidently devised for the purpose of enabling these white men, who have no right whatever, to take away from the ignorant and unprotected Indians a large share of the little remaining property left to them after the spoliation by the whites during our whole existence as a nation. No such doctrine, I am sure, has ever been applied in any instance between the whites, and if it is to be made the means of taking from these Indians their property it will be necessary to reverse the long established doctrine that, as between

the whites and the Indians, the laws are to be construed most favorably to the latter.

Counsel declares on the same page:

"It would be an absurdity to provide that one could lose or forfeit by any act a right which he had never acquired or possessed."

This would not be, however, half as absurd as to hold that when a white man is by virtue of his own wrong declared not entitled to *any* of the rights of a Cherokee citizen that he is thereby declared to have been entitled to *all* of the rights of a Cherokee citizen, and that the denial of any right in the future is the grant of all rights in the past.

On pages 29 to 30 the brief quotes the cases of—

Raymond *vs.* Raymond, 83 Fed. Rep., 721;
Nofire *vs.* U. S., 164 U. S., 657;
Nivens *vs.* Nivens, 133 Fed. Rep., 40,

to show that the courts of the Indian Territory obtained jurisdiction, criminal and civil, over intermarried white persons. No denial of this proposition has ever been made by us. On the contrary, we think the conclusions announced in those decisions are correct, because in each of the Cherokee intermarriage laws it is declared that—

"the peace and prosperity of the Cherokee people required that in the enforcement of the laws, jurisdiction should be exercised over all persons who may from time to time be privileged to reside within the territorial limits of this nation."

It was for the sole purpose of obtaining jurisdiction, for civil and criminal purposes, over white men intermarrying with Cherokees and privileged to reside in the territorial limits of the nation that the laws relating to intermarriage were passed by the Cherokee council. These laws expressly provided that such intermarrying white persons should take an oath subjecting themselves to the laws of the Cherokee

Nation. Our contention, however, is that obtaining jurisdiction to try criminals within a certain territory does not operate as a grant of lands or funds, and the brief of the opposing counsel contains no authority announcing such an extraordinary doctrine. If the above decisions quoted by counsel decide any point now in controversy, it is directly the opposite of the counsel's contention.

On page 31 he quotes from the case of Raymond as follows:

"His adoption into one of these tribes has the effect to bestow upon him the privileges and immunities of its members, and subjects him to the laws and usages of the tribe, but it *has no greater effect.*"

That distinctly states our position that these intermarried whites are subjected to the laws and usages of the Cherokee Nation by the intermarriage laws quoted in the briefs, and that these laws have no greater effect.

On page 30 the counsel refers to the provision of the Cherokee Constitution declaring who shall be citizens, and insists that the provision is prospective in its effect. In our brief, heretofore filed, we give our reasons for contending that it is not prospective, but that it simply declares that certain persons then living in the Territory are citizens, and that the future citizenship is to be composed of the descendants of such persons. Whatever may be the view of the court upon this question, however, it is clear that this citizenship related solely to political rights. It occurs in section 5 of the amendments to article 3 (Cherokee Laws 1892, p. 33), which article is devoted solely to the political branch of the government, stating what shall be the qualifications of the members of the national council and what the qualifications of the electors. No reference whatever to the property of the Cherokees or to property rights is made in either one of the seven sections of these amendments to article 3 of the Cherokee Constitution.

In addition, we insist that the Cherokee people, neither in convention assembled nor in their legislative department, had any authority to pass laws affecting the right and title to their

landed estate or to their vested funds, and that if an attempt had been made, which was not, to grant rights of property to persons other than Cherokees, it would have been utterly futile without the previous assent of the United States given by convention or treaty, as specifically set forth in the United States statutes.

The act of Congress of 1902 is sometimes called the Cherokee agreement. It is, however, only an act of Congress which, being submitted to the Cherokee people, was lost by the Cherokee vote, but was carried by the vote of 2,500 white persons who were trying to vote themselves a right to the property of the Cherokee people.

Section 25 of that act, however, provides:

"That only such persons are to be enrolled as are living September 1st, 1902, and who are *entitled to enrollment on that date.*"

The Cherokee people did not then and do not now understand that the intermarried whites were ever entitled to enrollment for the purpose of taking their property, and they have from the beginning to the present day contested this proposition with all their might.

On pages 33 and 36 counsel embodies long abstracts from certain reports of the Dawes Commission. None of these was offered in evidence before the Court of Claims, and we submit that they are not now properly embraced in this brief. It would be manifestly unjust to permit one counsel in a case to produce on an appeal such portions of documents as he considered were favorable to his clients without having offered them before the trial court and without an opportunity upon the part of the opposing counsel to object. It violates rule 1, paragraph 2, of the rules of this court involving appeals from the Court of Claims.

If these abstracts, however, show anything of value, it is that the Secretary of the Interior, having once decided that the intermarried whites were entitled to be enrolled by the Dawes Commission, was so impressed with the protest of the

Cherokees by blood and their legal rights as set forth therein that he stopped such enrollment and determined to take the opinion of the judicial branch of the Government before he would finally enroll any white men for the purpose of taking Cherokee property; and, further, that the total number of intermarried whites who have made application is 3,549 (Brief, p. 36), all of whose claims are placed among the doubtful claimants until this case is decided by this court.

The brief, on page 38, contains what is called the political platform of one of the several factions in the Cherokee Nation. The counsel ought to know that political platforms, like railroad platforms, are intended to get in on, but not to stand on. This has been clearly illustrated in this case, for after the petition was filed in the Court of Claims the Cherokee Nation, by its principal chief, filed a petition requesting the special permission of the court to intervene in the case, and from that day to the present it has fought the claims of the intermarried whites. This platform is the only document in the whole history of these people which undertakes, even by remote inference, to give to the intermarried citizens an equal share in the lands and funds of the Cherokee people. Its introduction here is evidently the last hope of these claimants, and it must be a surprise to this court to find that a claim for millions of dollars' worth of property should have for its foundation the shifting, uncertain, and flimsy plank of a political platform.

On page 38 the brief declares that Congress by the act of 1888 "had declared that a white man marrying an Indian woman, a woman of one of the Five Civilized Tribes, according to the laws of such tribe, acquired the right to tribal property and privileges." The act referred to is found in 25 Stat., p. 392, quoted in counsel's brief on page 41. The act simply prohibits white men marrying Indian women other than those of the Five Civilized Tribes from acquiring any tribal property, privilege, or interest, and because Congress chose to except the Five Civilized Tribes the counsel draws the conclusion and asserts that Congress thereby declared

that a white man marrying an Indian woman of the Five Civilized Tribes did acquire tribal property. This is another one of his numerous alleged grants by back action. The history of Indian legislation shows that Congress has legislated for the Five Civilized Tribes as a distinct body of Indians, who were entitled to different provisions of law from the general class of Indians, but this is the first instance in which such exception from the provisions of their laws is made to carry a direct grant to intermarrying white men. Such arguments in behalf of the intermarried whites must emphasize the fact that there is nowhere any real grant of property rights to them, or their learned counsel would not advance before the court such extraordinary propositions.

On page 40 counsel quotes from the opinion of Chief Justice Fuller in the case of Stevens against The Cherokee Nation, in which it is held that there seems to be a distinction between *admission to citizenship* merely and the distribution of property to be subsequently made. He construes that as being satisfactory, because he says:

"A Cherokee might be *born* after the rolls are closed and get no land, though he might be a citizen of the nation, if it was then in existence."

It will doubtless be a great surprise to the court to find that admission to citizenship referred to as taking place under the act of 1898 is the same thing as being born after the rolls are closed. Admission to the citizenship of a country is one thing; being born a native of a country is an entirely distinct thing.

On page 42 of the brief it is stated that the act of the Cherokee council of 1886 (R., 24) was utterly overthrown in the Whitmire case. This seems to be a most unfortunate reference for the counsel. The truth is that in the first Whitmire case (30 Court of Claims, p. 138) this act of the Cherokee council was declared unconstitutional and void, so far as it affected the freedmen. No one, however, has ever

pretended that the freedmen and the intermarried white citizens stood on the same plain or derived their alleged rights from the same source. But the Court of Claims in its decision in the Whitmire case (p. 152) utterly overthrows the claim of the counsel that every citizen is entitled to share in Cherokee property. After quoting the Cherokee law the court declares:

"The idea therefore existed, both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed 'the common property,' 'the lands of the Cherokee Nation.'"

If the Cherokee act of 1886 was utterly overthrown and if every citizen of the nation is entitled to property rights by virtue of his citizenship, the court will naturally want to know why it was that the white men have stood idle since the decision in the Whitmire case, made March 4, 1895, and made no claim and asserted no right of any sort to share in the large sums distributed to the other citizens of the Cherokee Nation. Why was it that they saw the Court of Claims in the second Whitmire case (30 Court of Claims, p. 180), decided March 18, 1895, distribute $7,240,000 to the citizens of the Cherokee Nation having property rights, giving to the freedmen $903,365 (p. 193) and the white men obtain no share of these millions and make no claim. So far from the court in either Whitmire case deciding in favor of the white men, it distinctly holds (30 Court of Claims, p. 188) that it does not intend to express an opinion as to the constitutional rights of the intermarried whites to any property in the Cherokee Nation.

Counsel also quotes from the veto message of Chief Bushyhead. He should have supplemented that with the statement that the representatives of the Cherokee people by two-thirds vote overruled the veto message of their chief and passed the act, such objections to the contrary notwithstanding. We submit that the great majority of the people's representatives

in the national council in both houses will come nearer interpreting the opinion of the people than their chief would do.

The burden of the argument of the counsel for the intermarried whites is that they are called citizens, and that Congress has directed that citizens shall be enrolled. We have demonstrated, we think, that all citizens are not to be enrolled, but such citizens only as are entitled to enrollment for the purposes of the act of Congress. But if Congress had declared that all citizens of the Cherokee Nation should be enrolled so as to take the property of the Cherokee people, we insist that Congress would have been without authority to do so.

This court has declared in numerous cases that the title of the Indians was such an interest in the soil that the United States was bound to respect it, as much so as if it had been a fee-simple title. That has been the law of this land from the beginning, and the United States has always so far recognized the title of the Indians that it would not deprive them of their landed property except by treaty stipulation. Congress has never claimed the right to dispose of Indian land without the consent of the Indian tribes, and it has under the Constitution of the United States no authority whatever to take away from the Indians either their lands or funds and bestow any part of them upon any other people. They might with equal justice have taken the lands of the Cherokees and given them to the Choctaws and Chickasaws or to any other one of the Five Civilized Tribes or to any other Indians or to the citizens of the United States as to give them to these intermarried white persons, whose sole claim arises out of the fact that they were living in the nation, and that for purposes of government only the Cherokees passed a law assuming control of them and requiring that they subject themselves to the laws of the land in which they lived. If the Cherokees had undertaken to bestow upon these whites property rights in Indian property such an attempt would have been null

and void, for there never has been a day since the United States assumed supervision over and responsibility for the Indian tribes that any Indians had authority to dispose of their property without the assent of the United States.

JOHN J. HEMPHILL,
Attorney for Cherokees by Blood.

K. S. MURCHISON,
Of Counsel.

FILE COPY.

FILED
MAR 5 1906
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Nos. ~~125, 126~~, 127 & 128.

DANIEL RED BIRD AND OTHERS, CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

In connection with the printing of the Cherokee constitution, laws, and treaties, I beg to make the following statement:

During the argument the chief justice suggested to counsel that they have printed for the use of the court so much of the constitution and laws of the nation, not already printed, as had been cited in the briefs or the record, together with the treaties between the Delaware Indians and the Shawnee Indians with the Cherokee Nation.

Mr. William Henry White, of counsel for the intermarried whites, secured the loan of my Cherokee law books for the purpose of having the above papers printed. At my suggestion, he sent me the printer's proof of the papers agreed to be printed. This I examined and consented to as containing all necessary articles, and he agreed to have them printed accordingly. Instead of printing only what was mutually agreed upon he afterwards inserted (page 27 of the printed paper) an alleged construction by the Interior Department of section 5 of article 3 of the Cherokee constitu-

tion. This was inserted without my knowledge or consent. I am not bound by it and do not admit its correctness. He also inserts page 33, what purports to be an act of the Cherokee council of December 4, 1894. This may or may not be correct. I have no means of verifying it, as the last volume of Cherokee laws in print was published in 1892.

He has also printed in large type on page 7 a statement of C. J. Harris, chief, declaring the Compiled Laws of 1892 to be in force as the laws of the Cherokee Nation. This is misleading, because the act of November 22, 1892, providing for this compilation, contains no authority to the chief to make such a declaration.

These insertions may not be important, but I cannot be placed in the attitude of agreeing to a construction of the law contradicting the position taken in my brief. I desire the court to know that these insertions were made without my knowledge, and in my judgment are both unfair to the appellants' counsel and to the court.

JOHN J. HEMPHILL,
Attorney for Cherokees by Blood, Appellants.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

Office Supreme Court U. S.
FILED
FEB 12 1906
JAMES H. MCKENNEY,

No. [redacted]126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. [redacted]127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted]128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR CHEROKEE NATION.

EDGAR SMITH,
Attorney for the Cherokee Nation.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20237

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

PRELIMINARY STATEMENT.

On February 24, 1903, the Secretary of the Interior addressed to the Court of Claims a request for the findings of fact and opinion relative to the claims of white persons inter-

married with Cherokee and other Indians incorporated into that nation. By that communication certain controverted questions which were pending in the Interior Department were submitted to the Court of Claims. That letter is as follows:

"DEPARTMENT OF THE INTERIOR, *Feb.* 24, 1903.

"To the Court of Claims:

"SIRS: By section 21 of the act of June 28, 1898 (30 Statutes, 498, 502), the Commission to the Five Civilized Tribes was directed to make rolls of citizenship of the several tribes, enrolling, among others, such intermarried white persons as may be entitled to citizenship under Cherokee laws. By the act of May 31, 1900 (31 Statutes, 221-236), said Commission was authorized to continue the exercise of authority heretofore conferred on it by law with a direction as follows: 'But it shall not receive, consider or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory, who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.' By the act of July 1, 1892 (32 Statutes, 716-720), further direction was given as to the making of the rolls of citizens of the Cherokee Nation as follows:

"'SEC. 25. The rolls of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

" 'SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled, as provided in section 25 hereof, shall be placed upon the roll made by said Commission and no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen since the 16th day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

" 'SEC. 27. Such rolls in all other respects shall be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898, (30th Statutes, page

495), 'and the act of Congress approved May 31st, nineteen hundred, (31 Stats., page 221).

"A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood against the enrollment of intermarried persons 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character.' It is asserted on the one hand that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the nation, and on the other hand that the Cherokee laws, as well as the laws of Congress, recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such nation, entitled to share equally with the full-blood citizens in the property of the tribe.

"The controverted questions involved in this matter now pending before this Department are respectfully submitted for your findings and opinion in accordance with the provisions of section 2 of the act of March 3, 1883 (22 Statutes, 485). The protest referred to, which states the questions involved, is enclosed herewith, and upon receiving information that any other papers in the possession of the Department are needed they will be promptly transmitted.

"Very respectfully, E. A. HITCHCOCK,
"Secretary."

Thereafter, on April 13, 1903, certain individual Cherokee Indians, by their attorney, John J. Hemphill, Esq., filed in the said Court of Claims their petition praying that the court report its findings and opinion to the Secretary of the Interior to the effect that the Cherokee Nation has never granted to the persons claiming rights in said nation by intermarriage any right, title, or interest in or to any of the lands or vested funds of said nation.

Thereafter the "answer of certain citizens of the Cherokee Nation who claim citizenship by intermarriage" was filed.

On October 7, 1904, the Cherokee Nation by leave of court filed its intervening petition, averring in substance as follows:

As the representative and having in its charge the interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them, it is directly interested in this cause. The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States. Under and by virtue of the provisions of certain acts of Congress and the treaties between the United States and the Cherokee Nation of Indians and the patent by the United States to the Cherokee Nation issued the 31st day of December, 1838, as supplemented and interpreted by the treaty of 1846, the people of the Cherokee Nation of Indians now own the lands embraced within the boundaries of the Cherokee Nation, Indian Territory, which by recent acts of Congress are being allotted in severalty to the individual citizens of the Cherokee Nation, who are entitled to share therein.

The said Cherokee Nation as a body politic possessed and under the provisions of its treaties was granted the right of local self-government, with full authority to make and carry into effect such laws as it might deem necessary for the government and protection of persons and property within its jurisdiction belonging to its own people. In the exercise of this power the Cherokee Nation ordained and established a written code of laws. Prior to 1855 certain white persons had married with Cherokees, and such marriages, while recognized as binding, had given rise to serious questions respecting the status of such intermarried white persons and the jurisdiction of the nation over them. It was in this year, 1855, that the Cherokee National Council passed its first act "Regulating intermarriages with white men," which act is as follows:

"AN ACT REGULATING INTERMARRIAGES WITH WHITE MEN.

"Whereas, the peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this nation; therefore,

"Be it enacted by the National Council, That any unmarried white man desiring to marry a Cherokee woman shall be and is hereby required to obtain a license for the same from any of the clerks of the district courts of the several districts.

"Be it further enacted: That before any license, as provided above, shall be issued, the person applying shall be and is hereby required to pay to the clerk to whom application is made the sum of five dollars, and he is also required to take the following oath:

" 'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation and will neither claim nor seek from the United States Government or its judicial tribunals any protection, privileges or redress incompatible with the same as granted to the Cherokee Nation by the United States in treaty stipulations entered into between them.'

"Be it further enacted: That all white men applying for licenses as provided in the first section of this act shall before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

"Be it further enacted: That all judges of this nation and every regular minister of all evangelical denominations having the care of souls, are hereby authorized and empowered to solemnize the rites of matrimony according to the ceremonies usually observed and performed in such cases under the provisions of this act.

"Be it further enacted: That no marriage between a citizen of the United States and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided, shall be legal; and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before any district court in this nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be entitled, for his services, to twenty per cent. of the amount collected and who shall place the remainder in the hands of the national treasurer for public benefit.

"Be it further enacted: That persons performing a marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to

the back of the license, which shall be returned. The holder of the license and the certificate shall then place the same in the hands of the clerk of the district court, whose duty it shall be to record the same in his office.

"Be it further enacted: That any white citizen of the Cherokee Nation by marriage, etc., who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian for any criminal offence committed within the limits of the Cherokee Nation, shall forfeit his right of citizenship to the same and be subject to be dealt with as other white intruders in the country and shall be removed out of this nation.

"Be it further enacted: That should any white man or woman become a citizen of the Cherokee Nation by marriage and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widow or widower shall continue to enjoy Cherokee privileges, unless such white widow or widower shall marry a white man or woman (as the case may be), then, in that case, all of his or her right to Cherokee citizenship shall cease.

"Be it further enacted: That any white man who shall lawfully marry under the provisions of this act and then or afterwards abandon his wife shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation and shall be and is hereby considered and shall be removed as an intruder."

October 15, 1855.

In pursuance of this policy the Cherokee Nation continued to exercise political control over such persons, exacting allegience of them as citizens of a body politic subject to its government, and extending to them civil, political, and personal rights, which include the right to vote and participate in the affairs of the nation, to reside within its limits, to trade, and use the public domain.

There is no word in the act which confers upon the intermarried white citizen the right in either the lands or the vested funds of the Cherokee Nation.

To make it more clear that substantial rights, other than property rights, were conferred by the act, and that they were recognized prior to the act, it should be borne in mind that

the United States had always promised to keep the country occupied by the Cherokee Indians free from the intrusion of the white man.

"SECTION 2134. Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent or subagent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

"SECTION 2135. Every person other than an Indian who, within the Indian country, purchases or receives of any Indian in the way of barter, trade or pledge, a gun, trap or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with white people, or any article of clothing except skins or furs, shall be liable to a penalty of fifty dollars.

"SECTION 2147. The superintendent of Indian affairs and the Indian agents and subagents shall have authority to remove from the Indian country all persons found therein contrary to law, and the President is authorized to direct the military force to be employed in such removal.

"SECTION 2148. If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars."

Act of Congress 30th June, 1834; Revised Statutes of the United States, pages 372-374.

The treaty of 1866 provides as follows:

"All persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation or remaining in the same, except as herein otherwise provided; and it is the duty of the United States Indian agent for the Cherokees, to have such persons not lawfully residing or sojourning therein, removed from the nation as they now are or hereafter may be required by the Indian intercourse laws of the United States."

Even as late as the convention of 1893, between the United States and the Cherokee Nation, providing for the sale of what is known as the Cherokee Outlet, it is provided in article 2 as follows:

"First. That all persons now resident, or who may hereafter become residents in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation or in the employment of the citizens of the Cherokee Nation in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not residents in the Cherokee Nation under the provisions of treaties or acts of Congress shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section 6 of the treaty of 1835 and sections 26 and 27 of the treaty of July 19, 1866, and shall together with their personal effects be removed without delay from the limits of the said nation by the United States as trespassers, upon the demand of the principal chief of the Cherokee Nation. On such removal no houses, barns, outbuildings, fences, orchards, growing crops or other chattels real, being attached to the soil and belonging to the Cherokee Nation or the owner of the land, shall be removed, damaged or destroyed, unless it shall become necessary in order to further the removal of such trespassers."

The act of the Cherokee National Council of 1855, above set out, remained unchanged until 1874, when the Cherokee National Council adopted a new code, which contained among other things a provision relating to intermarriage, which provision is set out *in extenso*, beginning near the close of page 16 of the record. Section 75 of this act of 1874 carries a provision as follows:

"Provided also that the rights and privileges herein conferred shall not extend to the right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general funds of the national treasury a sum of money, to be ascertained and fixed by the National Council equal to the *pro rata* share of each native Cherokee in the

lands and vested wealth of the nation, estimated at five hundred dollars, and thereafter conform to the constitution of the nation and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent and be entitled to all the rights of other Cherokees."

The constitution of the Cherokee Nation of 1839, in regard to the authority of the National Council to admit to citizenship, remained unchanged by the amendments to the constitution in 1866, and the council was by constitution limited in authority to the *readmitting* of persons who had once been citizens of the Cherokee Nation.

Record, page 39.

Under this act of 1874 but two persons took advantage of said act, and neither of those persons is a party to this suit, and none of the said intermarried persons who are parties to this suit paid or offered to pay into the general fund of the Cherokee Nation the sum of $500 or any other sum estimated as equal to the *pro rata* share of each Indian Cherokee in the lands and vested wealth of the Cherokee Nation.

Record, page 45.

The act of 1874, passed on December 5 in said year, but which did not take effect until November 1, 1875 (Record, page 40), was on the 28th day of November, 1877, amended by the National Council of the Cherokee Nation by striking out of the provision quoted from section 75 thereof everything after the words "this nation," where said words occur in the third line of such proviso of said section, so that said proviso remained after its amendment as follows:

"Provided also that the rights and privileges herein conferred shall not extend to the right of soil or interest in the vested funds of this nation."

Record, page 52.

On November 29, 1878, the Cherokee National Council passed the following act:

"Be it enacted by the National Council, That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and they are hereby readmitted into the rights and privileges of the Cherokee Nation: *Provided,* That the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation."

Record, page 57.

December 3, 1878, the Cherokee National Council made the following enactment:

"Be it enacted by the National Council, That David N. Allen, Mary Allen and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens."

Concurred in by council with the following amendment:

"Provided that David N. Allen, the petitioner, shall not acquire any rights except such rights as attach to white men adopted citizens of (the) Cherokee Nation."

The act of the Cherokee National Council of November 27, 1880, relative to the marriage of other Indians than Cherokees with Indian citizens of the Cherokee Nation provides that the marriage shall be conducted according to the law regulating marriages between "our own citizens," but when this is done the Indian *so* married shall be "deemed a Cherokee citizen to all intents and purposes and entitled to all rights of other Cherokees."

Record, page 52.

In 1880 the National Council passed an act requiring additional evidence of the good moral character of the white men desiring to marry an Indian; also the payment of five dollars additional.

Record, page 52.

In 1890 the National Council passed a further act providing for the forfeiture of intermarried white's status upon certain conditions.

There has never been any act passed by the National Council of the Cherokee Nation attempting to grant property rights to an intermarried white person, except that provision of the act of 1874 which was taken advantage of by two individuals who are not parties to this suit, and that provision pointed out the way by which an intermarried white citizen could obtain property rights in the Cherokee Nation and which has no application to the parties to this suit, who base their claim solely upon the fact that they were made citizens of the Cherokee Nation.

As a matter of fact, the provision of the act of 1874 extending the privilege of purchasing the right in the nation did not take effect until November 1, 1875, and was repealed by the National Council, November 28, 1877, as hereinbefore shown.

From 1875 to 1877 the act of the National Council prescribed the rule of action and pointed out the way by which a property right could be acquired. In 1877 this provision was stricken out, leaving the express declaration that "the rights and privileges herein conferred shall not extend to the right of soil or interest in the vested funds of this nation."

The act of 1855 did not grant such interest, but after the experience of 1874 the express negative of such possible contention might have been thought necessary by the Indian in his effort to keep the remnant of land which he then held. With this *notice* of the limitation, always in existence, the law has remained unchanged in this particular.

Section 5 of the constitution of 1839 is as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council, but a free Cherokee male citizen, who shall have attained the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs of this nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either

by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

"SEC. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

Section 5, as amended in 1866, reads as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

Laws of the Cherokee Nation, 1892, pages 14 and 33.

The Cherokee Nation in 1880 provided for the taking of the census, which act is found at page 53 of the record. This was a census. It carried descriptive matter appended to each name, showing how each person became a citizen of the Cherokee Nation. The descriptive matter was adopted with the roll.

June 28, 1898, Congress made an enactment directing the Commission to the Five Civilized Tribes, in making rolls of citizenship of the Cherokee Nation, "to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress and to enroll all persons now living whose names are found on said roll * * * with such intermarried white

persons as may be entitled to Cherokee citizenship under Cherokee laws."

July 1, 1902, Congress passed an act which was ratified by the Cherokee Nation and which carried the following provisions:

"SECTION 25. The roll of citizens of the Cherokee Nation shall be made as of September 1st, 1902, and the names of all persons then living and entitled to enrollment on that date, shall be placed on said roll by the Commission to the Five Civilized Tribes.

"SECTION 26. The names of all persons living on the 1st day of September, 1902, entitled to be enrolled, as provided in section 25 hereof, shall be placed upon the roll made by said Commission and no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen since the 16th day of December, 1895, shall be entitled to enrollment or to participate in the distribution of tribal property of the Cherokee Nation. (Sec. 27.) Such roll in all other respects shall be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Statutes, page 495), and the act of Congress approved May 31, 1900 (31 Statutes, page 221).

"SECTION 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of the lands as herein provided, the said Commission shall from time to time, as soon as practicable, forward to the Secretary of the Interior lists, upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which the allotment of lands and distribution of other tribal property shall be made."

This statement reviews, in the main, the history of the legislation of the nation, relating to the status of the white citizen, and leads up to and includes those recent acts of Congress upon which the final division of the properties of the Cherokee people depend. But there are some additional facts which have occurred from time to time and which are im-

portant to a proper understanding of the status of the white intermarried citizen in the Cherokee Nation. Ever since the enforcement of what is known as the new code in the Cherokee Nation, on November 1, 1875, a law permitting suit against the nation by any of its members has been in force, which law is fully set forth on page 29 of the record.

No action at law or suit in equity was ever brought under the act respecting the liability of the nation to her own citizens, founded on sections 130, 131, 132, and 133, inclusive, under chapter 26, New Code (1875), for or on behalf of any intermarried person asserting any claim to a share or interest in the funds or any portion thereof which had been distributed since 1875.

Record, page 57.

An Indian woman named Pauline Shannon, claiming rights of property as such, married prior to January 1, 1895, to a white man named George Shannon, in accordance with the laws of the Cherokee Nation governing intermarriage of white men and foreigners, and S. M. Barbee, a Cherokee Indian by blood and claiming rights as such, married Samuel Barbee, a white man, prior to January 1, 1895, in accordance with the laws of the Cherokee Nation governing intermarriage of white persons and foreigners. In the year 1895 the said Pauline Shannon and the said S. M. Barbee, each for herself, and the first named for her children also, brought suit against Stephen Tehee, as assistant and acting chief of the Cherokee Nation, under the provisions of the act aforesaid, demanding a distributive share for themselves, and Pauline Shannon for her children also, in the funds distributed by the nation theretofore, and judgment was rendered in favor of said parties and against the Cherokee Nation in the circuit court of said nation, and upon appeal to the supreme court of the Cherokee Nation that judgment was affirmed. At the time said suits were instituted and during the pendency of each in the courts of the nation and at the time final judgment

was rendered, both George Shannon and Samuel Barbee were intermarried white persons and husbands of the said Pauline Shannon and S. M. Barbee respectively, and each lived with his wife and was acknowledged as a citizen of the Cherokee Nation by intermarriage. Neither of those men had participated in the distribution of said funds. Neither of these were parties to either suit, nor did either of them make application to be made a party, nor was any claim made theretofore, nor has there been since, on behalf of either of them for a distributive share of said funds or any portion thereof under said law.

Record, page 58.

The citizenship of the Cherokee Nation is made up as follows: The Cherokees, the Delawares, the Shawnees, the freedmen, and the intermarried whites. The Cherokee Nation received a patent to the lands now within the limits of the Cherokee Nation, Indian Territory, December, 1838.

The Cherokee constitution, section 20, article 3, declares that treaties shall be the supreme law of the land.

On the 19th day of July, 1866, a treaty was entered into between the United States and the Cherokee Nation, containing the following provision:

"ARTICLE 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees residing in the Cherokee country, they shall be incorporated into and ever remain a part of the Cherokee Nation on equal terms in every respect with said native citizens. And should any such tribe

thus settling in said country decide to preserve their tribal organizations and maintain their tribal laws, customs and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district or country set off for their use by metes and bounds, equal to one hundred and sixty acres if they should so decide, for each man, woman and child of said tribe and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price is to be fixed by the President. And the said tribe thus settled shall also pay into the national fund a sum of money to be agreed upon by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees." * * *

Record, page 23.

On the 8th day of April, 1867, articles of agreement were made between the Cherokee Nation and the Delaware tribe of Indians, which contained, among other things, the following provisions:

"Whereas, by the 15th article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, * * * now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows: The Cherokees, parties of the first part, for and in consideration of certain payments and the fulfillment of certain conditions, hereinafter mentioned, agree to sell to the Delawares for their occupancy, a quantity of land, * * * nor shall the continued ownership or occupancy of said land by any Delaware so registered, be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon citizens thereof. On the fulfillment by the Delawares of the foregoing stipulations all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities and the same

participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided. And the children born to such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

On June 7, 1869, there was a like agreement between the Cherokee Nation and the Shawnees. In the case of the freedmen nothing was paid, because their incorporation with the Cherokees was enforced by the United States as a condition to the continued existence of the Cherokee Nation.

"At the close of the Civil War the Cherokee territory was conquered territory and the Cherokee Nation at the mercy of the United States." (Whitmire *vs.* Cherokee Nation, 30 Court of Claims Reports, 138-150.)

It may be stated here that after this case was submitted to the Court of Claims, as hereinbefore set forth, there was made an enactment by Congress as follows:

"That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States,' departmental, numbered 76, now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States, within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing." (Act 3rd March, 1905, 34 Stats. L., page —.)

Record, page 36.

Upon the foregoing facts the Court of Claims concluded as matters of law as follows:

"Conclusions of Law.

"That such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the first day of

November, 1875, are equally interested in and have equal per capita rights with the Cherokee Indians by blood, in the lands constituting the public domain of the Cherokee Nation and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation, except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; that the rights and privileges of those white persons who intermarried with Cherokee citizens subsequent to the first day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation and such intermarried persons are not entitled to share in the allotment of lands or in the distribution of any of the funds belonging to said nation and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1, 1875, and those who intermarries with Cherokees by blood and subsequently being left widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives shall have no part or share in the Cherokee property and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people, and are not entitled to be enrolled for such purpose. By the Court."

BRIEF.

Upon these facts it is contended:

I.

THAT WHITE PERSONS WHOSE SOLE CLAIM IS BASED UPON INTERMARRIAGE ARE NOT ENTITLED TO BE INCLUDED IN THE DISTRIBUTION OF THE LANDS AND VESTED FUNDS OF THE CHEROKEES:

(*a.*) Because they have not acquired, by treaty or contract, any interest therein.

(*b.*) Because the laws, usages, and customs of the Cherokees exclude them, and make a positive distinction between the rights of citizens, as understood by the Indians, and the privileges extended to and enjoyed by intermarried whites residing among them.

Act, October 15, 1855 (Record, page 50).
New Code Laws, 1875 (Record, pages 51 and 55).
Act, November 28, 1877 (Record, page 52).
Act, December 11, 1880 (Record, page 52).
Act, December 6, 1890 (Record, page 55).
Treaty, July 19, 1866 (14 Stats., page 799).
Agreement with Delawares (Exhibit A, page 277, Record, page 56).
Agreement with Shawnees (Exhibit A, page 281, Record, page 56).
Act, November 29, 1878 (Record, page 57).
Act, December 3, 1878 (Record, page 57).
Act, April 27, 1886 (Record, page 56).
Act, November 27, 1880 (Record, page 52).
Act, May 19, 1883 (Record, page 56).

(*c.*) Because the National Council of the Cherokee Nation was not authorized by the constitution thereof to grant a right to soil or interest in the vested fund.

Record, pages 39, 40.

(*d.*) Because those who have intermarried subsequent to January 1, 1875, are expressly excluded from any right to soil or interest in the vested funds.

New Code, 1875 (Record, pages 52 and 55).
Act, November 28, 1877 (Record, pages 52 and 55).

(*e.*) Because this distinction has been known to, accepted, and acquiesced in for more than fifty years by the intermarried whites residing in the Cherokee Nation.

Act, October 15, 1855 (Record, page 50).
Constitution of 1839 (Record, page 39).
Act, November 28, 1877 (Record, page 55).
Act of Congress, October 1, 1890 (26 Stats., 636).
Act of Congress, June 28, 1898 (30 Stats., 495).
Stephens *vs.* Cherokee Nation, 174 U. S., 488.

(*f.*) The claim is not based on any consideration, is unconscionable, inequitable, and unjust to the Indians.

Journeycake *vs.* Cherokee Nation, 28 C. Cls., 281.
Treaty, May 28, 1828 (7 Stat., page 313).

II.

THE LAWS OF CONGRESS RECOGNIZE IN INTERMARRIED WHITE PERSONS THOSE RIGHTS AND NONE OTHER TO WHICH THEY ARE ENTITLED UNDER THE LAWS, USAGES, AND CUSTOMS OF THE CHEROKEES:

Act, March 3, 1893 (27 Stats., page 645).
Act, June 10, 1896 (29 Stats., page 321).
Act, June 7, 1897 (30 Stats., page 62).
Act, June 28, 1898 (30 Stats., page 495).
Act, May 31, 1900 (31 Stats., page 170).
Act, July 1, 1902 (32 Stats., page 716).
Stephens *vs.* Cherokee Nation, *supra.*
Mackey *vs.* Coxe, 18 Howard, 102.
Delaware Indians *vs.* Cherokee Nation, 193 U. S., 144.
Cherokee Trust Funds Case, 117 U. S., 311.
Minnesota *vs.* Hitchcock, 185 U. S., 396.

ARGUMENT.

THE STATUS OF THE INTERMARRIED WHITE CITIZEN IN THE CHEROKEE NATION AS DEPENDENT UPON:

FIRST. THE ACTS OF THE CHEROKEE NATIONAL COUNCIL.

SECOND. THE CONSTITUTION OF THE CHEROKEE NATION.

THIRD. THE ACTS OF CONGRESS.

I.

FIRST. THE ACTS OF THE CHEROKEE NATIONAL COUNCIL.

The intermarried whites, so called, claim property rights in the Cherokee Nation solely by virtue of their intermarriage with Indian citizens thereof. They assert that their rights to Cherokee lands and funds spring from citizenship. These claimants must rest upon the question of what is the effect of citizenship in the Cherokee Nation, for it cannot be said that they have acquired the right to share in the lands of the Cherokee people or in their funds by any grant conveying such rights in express terms. Just here is the difficulty which confronts them and which inheres in the situation. When called upon to say just where they stand and by what particular grant they expect to acquire a property interest in the lands and moneys of the Cherokee Nation, it is submitted that the answer cannot be satisfactory. Whether the right is claimed by virtue of the acts of the Cherokee National Council, or by virtue of the Constitution of the Cherokee Nation, or under acts of Congress, or by all combined, the dominant fact recurs that nowhere and at no time have these claimants been given any interest in the lands and money of the Cherokee Nation in express terms.

It has been asserted by these claimants—and their lan-

guage will be quoted as portraying the character of the claim:

"If we take the acts of the Cherokee Nation alone we find that in 1875, and from 1880 to 1895, intermarried whites unquestionably acquired rights of property by intermarriage; and that from 1875 until 1880 we submit they did also by virtue of subsequent legislation of the nation, the constitution, and the agreement, and the acts of Congress, particularly those whose names are on the 1880 roll."

Brief on behalf of claimants by intermarriage, Court of Claims, page 187.

In the light of the history of the laws of the Cherokee Nation, as well as the legislation of Congress upon this subject, no better illustration of the sweeping claims can be furnished.

But, to discuss the issues in the order just suggested, attention is invited to the various acts of the Cherokee National Council relating to or throwing any light upon the status of the intermarried white citizen from the beginning.

The act of the Cherokee National Council of October 15, 1855, found at page 50 of the record, in its opening clause provides:

"Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws jurisdiction should be exercised over all persons whatever who may from time to time be privileged to reside within the territorial limits of this nation, therefore * * * an 'unmarried' white man" * * * etc.

Throughout this entire act, which is one of much minuteness of detail, there is not one word indicating any intention upon the part of the Cherokee Nation to confer any property right whatsoever upon the intermarried white citizen. This act was passed in 1855, and was the first act of the Cherokee National Council on the subject of intermarriage with whites after the uniting of the two branches of the Cherokee family, Eastern and Western, and the adoption of the constitution of 1839. Considered in the light of the then

conditions, the Indian laws and customs, by which the grant of a landed interest was unknown except through the medium of a treaty, and the acts of Congress of 1834, providing that a citizen of the United States should not go into the Indian country without a passport, and that he was to be removed therefrom as an intruder, it is clear that the act of the Cherokee National Council of 1855 conferred a substantial right upon the intermarried white man by permitting him to reside in the Cherokee Nation. As a matter of history, the Cherokee Nation, shortly after the arrival of John Ross and the Eastern Cherokees in the present Cherokee Nation, enacted a law which provided the penalty of death against any Indian seeking to dispose of Indian lands, and that this penalty should be inflicted anywhere within the confines of the Cherokee Nation, by any citizen thereof, in the most convenient manner possible; and this, too, in the light of the fact that from 1808 the printed laws of the Cherokee Nation are in existence, presenting a clear, definite, and orderly system, applicable to their race and condition.

The act referred to is not only remarkable within itself, but be reason of being found in such a compilation. It goes to show the extreme anxiety of the Indian with regard to the subject of his lands and his desire to protect the remnant then remaining. The acts of Congress from 1834 and the treaty stipulations between the United States and the Cherokee Indians repeatedly agreed that the United States should remove from the Cherokee Nation all white persons save a small class mentioned in the various provisions. All bear testimony to the same unalterable purpose. Even as late as 1893, in the convention by which the Cherokee Outlet was ceded to the United States by the Cherokee Nation, there is set forth with much minuteness of detail the absolute promise upon the part of the United States to remove any unauthorized citizen of the United States from the Cherokee Nation upon the request of the principal chief thereof. It cannot be sound to say that because a man was privileged to reside in the Chero-

kee Nation and to acquire rights of citizenship, and because the Cherokee Nation exercised jurisdiction over him, that he should for these reasons have a share of the property belonging to the individual members thereof. It might as well be said that because a man marries into a family and has conferred upon him privileges incident to such a relation, and the right to live with them, possibly, that upon a subsequent division of the estate of his wife's family he could claim to be one of the heirs to that property.

The Cherokee act of 1855 stood unchanged until the adoption of the Code of 1874 by the Cherokee Nation, which carried a provision, in section 75 thereof, as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such admitted citizen shall pay into the general funds of the national treasury a sum of money to be ascertained and fixed by the National Council equal to the 'pro rata' share of each native Cherokee in the lands and vested wealth of the nation, estimated at five hundred dollars, and thereafter conform to the constitution of the nation, and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to all the rights of other Cherokees."

This provision of the code did not go into effect until November 1, 1875.

Record, page 51.

The National Council on the 28th day of November, 1877, passed the following:

"*Be it enacted by the National Council,* That chapter 13, article 15, section 75, of the new code laws be, and the same is hereby, amended so as to strike out of said section in the last proviso, from the words 'this nation' where said words end in the third line in said proviso of section 75."

So that said proviso, after this amendment, read as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation."

Record, page 52.

That is to say, all of that provision of section 75 attempting to confer property rights upon the adopted white citizen upon the payment of $500 therefor was repealed by express terms, leaving in force the express provision that the rights and privileges of the intermarried white should not extend to right of soil or interest in vested funds.

Without at this time discussing the question of the constitutional right of the National Council to pass any act conferring a property right upon a white intermarried citizen, under the constitution of 1839 and the amendments thereto of 1866, it may be fortunate for the Cherokee Nation that the privilege of purchasing a right in soil and funds, which remained a law for only two years, was inserted, for it was not only withdrawn (the record showing that only two persons, who are not parties to this suit, took advantage of said provision—Record, page 55), but after this attempt upon the part of the National Council to exceed its authority under the constitution, the act repealing the provision referred to left in the section in which said provision occurred the express words, as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation."

In the language of the Court of Claims in this case:

"The National Council enacted what was already the law by implication, an express proviso to section 75 of the Code of 1874, 'that the rights and privileges herein conferred (the right of white persons to acquire citizenship by intermarriage) shall not extend to right of soil or interest in the vested funds of this nation.'"

This further shows that at the time the attempt was made by the Cherokee National Council to confer property rights upon the white adopted citizen, although it was so unpopular as to be repealed within two years, even in the mind of the council which passed the law the right was to be a *purchased* right, and the white adopted citizen taking advantage of it was required to pay into the national funds the sum of $500. There was no infringement of the constitution of the Cherokee Nation to say that the white man might become a citizen of the Cherokee Nation and reside therein and be subject to its laws; but he acquired no property rights thereby.

It is respectfully but earnestly urged that the conclusion of the Court of Claims that those Cherokees who married prior to the adoption of the Code of 1874-'75 are entitled to property rights in the Cherokee Nation is wrong and not justified by the court's own premise. The court says:

"Accordingly the National Council enacted what was already the law by implication, an express proviso to section 75 of the Code of 1874, 'that the rights and privileges herein conferred (the right of white persons to acquire citizenship by intermarriage) shall not extend to right of soil or interest in the vested funds of this nation' * * * Whoever married after that enactment married with due notice of the limitation set upon his rights and privileges as a citizen."

But was notice necessary? If it was inserted out of abundance of caution, after the experience of the attempt upon the part of the National Council to confer property rights upon the intermarried citizen, it did not *create* a right in those marrying before the notice, when they had no such right theretofore. If the rights of the intermarried whites should not extend to soil or interest in the vested funds, and this was the law by implication before the use of those words, how could the mere giving of the notice in this way create a right which the intermarried citizen did not have before? One might post a notice today that no person should come into his yard and cut flowers. It would not follow that those who

had, without right, done so on yesterday would acquire a vested interest in the flower garden.

It is submitted that the view that the notice in the Cherokee statute, after 1877, was declaratory of what the law had always been, which was that the intermarried citizen should not take a property right, forces the conclusion that those who married prior to the Code of 1874-'75 are not entitled to the property right.

In 1880 the National Council passed a law for the purpose of taking a census. This was to be, and was approved as, a census. The descriptive matter was approved with the names. To illustrate, refer to page 60 of the record, showing the manner in which the admitted whites were enrolled:

Number.	Name.	Nativity.	Age.	Sex.
1970	Walker, Sarah A.....	White.....	23	F.

That this roll was a census roll appears from an inspection of the act authorizing all persons residing or sojourning in the nation to be enrolled thereon. The roll, when made, included in the census with those who were citizens and entitled to share the property the names of many persons who have never been recognized as members of the tribe, nor lawfully admitted as such. Further, the character of the act is illustrated by the following special act of the National Council, approved December 11, 1883:

"*Be it enacted by the National Council*, That the principal chief be and he is hereby authorized to have corrected the error in the registration of the name of W. D. Clingan on the authenticated census roll of Cherokee citizens, 1880-'81, said W. D. Clingan being registered on said roll for Cooweescoowee district, as an adopted white citizen, whereas the said W. D. Clingan is a well known and entitled Cherokee citizen by blood and descent, and to be so registered, as he has been before and since 1880; and the principal chief is authorized to direct and make the correction accordingly."

The reference by act of Congress to the 1880 roll will be discussed later, in connection with the claims of intermarried citizens as based upon the acts of Congress. Both before and after the taking of the 1880 census, the intent of the Cherokee National Council to confine the white adopted citizen to civil, political, and personal rights is manifest through special acts.

On the 29th day of November, 1878, the council passed the following act:

"*Be it enacted by the National Council,* That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and are hereby readmitted into the rights and privileges of citizens of the Cherokee Nation: *Provided,* That the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation."

Record, page 57.

On December 3, 1878, again:

"*Be it enacted by the National Council,* That David N. Allen, Mary Allen and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens."

Concurred in by council with the following amendment:

"*Provided,* That David N. Allen, the petitioner, shall not acquire any rights except such as attach to white men, adopted citizens of the Cherokee Nation."

Record, page 57.

In 1883 the council passed an act of which the following is the opening clause:

"*Be it enacted by the National Council,* That when the additional amount appropriated by the act of Congress of March 3, 1883, shall have been received by the treasurer of the Cherokee Nation, the principal chief shall cause the same to be paid out 'per capita' to the citizens of the Cherokee Nation by blood * * *."

Record, page 56.

There was, November 26, 1890, passed an act of National Council providing for distribution of proceeds of strip lands to Cherokees by blood only.

Record, page 57.

This latter provision is subjected to criticism by the claimants, in that the effort of the nation to confine the payment to Cherokees by blood was not successful in the cases of the Delawares, the Shawnees, or even the freedmen. This will be referred to later.

At this time it is desired to suggest that since the intermarried whites insist upon a construction of the act of the National Council of 1895 as a legislative construction of their rights, it is difficult to see in what way they can avoid the effect of the construction by the National Council of the Cherokee Nation, of 1883, 1886, and 1890, that they were not entitled to a property right in the Cherokee Nation.

This act of 1895 does not appear to be in the record, and this point is not waived; but if it is considered, it appears to be another instance of abundance of caution upon the part of the Cherokee Nation in trying to protect itself. The converse of the 1895 act should not be taken as true, that it was thereby intended to recognize property rights in those who married prior to the fifth day of December, 1895. It is but another declaration upon the part of the Indian (after the decision in the Journeycake case) that the white adopted citizen should not have property rights.

In the light of all of the legislation which precedes the Cherokee act of 1895, it is not hard to understand. It is clear that there was no intention to confer property rights upon intermarried white persons who married at any time. It was no attempted construction of previous acts. It was simply another declaration that the Indian did not want the white man to share his land. It may have been, and was, unnecessary; but that does not alter the case or warrant making that act the basis of an affirmative property right to the

intermarried white by inference. It is strange that, with all the acts and the treaties covering a period of half a century, these claimants at every point of contact are insisting upon taking something by some inference rather than by any express grant.

SECOND. THE CONSTITUTION OF THE CHEROKEE NATION.

Leading up to the adoption of the constitution of the Cherokee Nation of 1839, there is much history pertaining to the affairs of the Cherokee people, and especially during the years just preceding 1839. As early as 1808 the Cherokee people in the old nation east of the Mississippi river had separated, and some had gone west, into what is now Arkansas, and later, by the treaty of 1828, had been removed into the present Cherokee Nation, Indian Territory. It was after the treaty, so called, of New Echota, in 1835, that John Ross, the then chief of the Cherokees, East, commenced the forced removal of the Eastern branch of the Cherokee family to the west. There is much material for the historian and poet in the recital of the events of those times; but it is sufficient here to say that for eight years prior to the removal of the Eastern Cherokees by John Ross he had successfully baffled every effort of the Government of the United States looking to a cession of the lands of the Cherokees in the East. It was with an eye single to the preservation of the remnant of the lands in the Cherokee Nation, Indian Territory, that the two branches of the Cherokee family, the Eastern and the Western, reunited and formed the constitution of 1839. It was declared by this constitution that the lands should remain common property; but this is to be taken in connection with the then custom of the Indians; also the laws of Congress in force at that time, absolutely prohibiting the presence of any white person except those in the military service of the United States, and a few others named in the provision.

"SECTION 2134. Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent or subagent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

"SECTION 2135. Every person other than an Indian who, within the Indian country, purchases or receives of any Indian in the way of barter, trade or pledge, a gun, trap or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with white people, or any article of clothing except skins or furs, shall be liable to a penalty of fifty dollars.

"SECTION 2147. The superintendent of Indian affairs and the Indian agents and subagents shall have authority to remove from the Indian country all persons found therein contrary to law, and the President is authorized to direct the military force to be employed in such removal.

"SECTION 2148. If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars."

Act of Congress 30th June, 1834; Revised Statutes of the United States, pages 372-374.

Therefore this provision of the constitution contemplated that the lands should be the common property of the Cherokee Indians; and even here the constitution so jealously guarded the rights of the nation that it provided that those Cherokees who should remove with their goods and effects from the Cherokee Nation and become citizens of another government should forfeit all rights in said nation. But it did confer upon the National Council the power to *readmit*, by law, to all of the rights of citizenship any such person or persons who might at any time desire to return to the nation, on memorializing the National Council for such *readmission*.

There is no other provision of the 1839 constitution by which any power is vested in the National Council with regard to the readmission of persons theretofore members of the tribe. The Cherokees had studiously avoided intercourse with the white man, and the laws of the United States prohibited it. Even those who had once been members of the tribe could again become such only by memorializing the National Council. This provision limiting the right of the National Council to act upon the readmission of those only who had once been members of the tribe was clearly what was intended and is a manifest limitation on the power of the National Council to exceed that authority. Why should the council have conferred upon it the right to vote away the lands belonging to the members of the tribe or nation? The history of the Cherokee people had shown that they never parted with their lands except by solemn treaty, and in this constitution they declare that the treaties shall be the supreme law of the land. This constitution remained without change until the year 1866, when, in order to maintain their life as a nation, the Cherokees submitted to many measures well nigh in the nature of a revolution. The act of 1855 permitting marriages between the whites and the Indians had been passed by the Cherokee National Council, and the amendment of 1866 does mention as citizens of the Cherokee Nation all whites legally members of the nation by adoption, residing within the limits of the nation.

The amendments in 1866 to the constitution of 1839 did not in any way enlarge the authority of the National Council, as fixed in the constitution of 1839, relative to the adoption, or rather readmission, of members of the tribe or nation. The amendments did not confer or attempt to confer authority upon the National Council to create new citizens by the adoption of those intermarried or otherwise.

Speaking of those amendments, the Court of Claims said in this case:

"These constitutional amendments were brought about by the action of the United States at the close of the civil war

in dictating that the slaves or freed persons of color in the Cherokee country, should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens; but be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States, whereby their former slaves were made their political equals, and the common property of the Cherokees was to be shared in with their servants and dependents, was in effect a revolution. The constitutional amendment quoted was simply declaratory of the new order of things. It is not necessarily prospective, and does not impose limitations upon the legislative power with regard to the naturalization or future adoption of aliens as citizens. Under the polity of the Cherokees, citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund, or never so much as thought of receiving it, form a concrete object lesson in constitutional law not easily effaced from the common mind."

Record, page 40.

It is another effort to acquire valuable property interests by an inference.

It is pertinent to inquire just what are the actual provisions of the constitution of 1839, and the amendments of 1866 and particularly the connection in which they occur and the subject-matter of section 5 of the constitution of 1839, as well as the amendment thereto, as found in "amendments to article 3, section 5."

Section 5 of the constitution of 1839 is as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council, but a free Cherokee male citizen, who shall have attained the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs of this

nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

"SEC. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

Section 5, as amended in 1866, reads as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

Laws of the Cherokee Nation, 1892, pages 14 and 33.

A quotation of *that part* of the amendment simply providing that whites legally members of the nation by adoption shall be deemed to be citizens of the Cherokee Nation does not disclose the true purview of the provision. It is found in that portion of the constitution relating solely to offices and elections, and the amendment was aimed at making certain changes in the original constitution as to who should be eligible to a seat in the National Council and does not in any way relate to the question of property rights. The subject-matter before the Cherokee people in this regard was purely political status and is shown to be such conclusively by the

full text of the provisions themselves, as well as that which goes before and that which follows.

The effort to construe the words "citizens of the Cherokee Nation," found in the connection just stated, so as to give to the claimants a valuable property right by seeking to make it relate to the original constitutional provision of 1839, that the lands of the Cherokee Nation should be common property, is too far-fetched to be argued. As a matter of fact it is worse than far-fetched. The contention is absolutely refuted by the provisions themselves.

When the Delawares and the Shawnees were incorporated into the Cherokee tribe it was not thought sufficient to simply say that they should be "taken and deemed to be citizens of the Cherokee Nation."

Cherokee Nation *vs.* Journeycake, 155 U. S., 196, 208.
United States *vs.* Blackfeather, 155 U. S., 180.

In case of the freedman it was specifically imbedded in the treaty itself that he should have all of the rights of the native-born Cherokee.

Moses Whitmire *vs.* Cherokee Nation, 30 Ct. Claims, 181.

Just here it may be pertinent to inquire what composes the citizenship of the Cherokee Nation, and how have those who have been determined to have acquired property rights gained them? Has it been by act of the National Council of the Cherokee Nation, or by act of Congress, or has it been by that method mentioned in the constitution of 1839 of the Cherokee Nation—that is to say, by treaty which that constitution recognizes as the supreme law of the land? The citizenship of the Cherokee Nation has been made up of the Cherokee Indians, the Delawares, the Shawnees, the white adopted citizens (meaning those persons who have intermarried with Indians by blood), and the freedmen, who were the slaves of the Cherokees. The lands originally in Decem-

ber, 1838, were patented to the Cherokee Nation, composed at that time of the Eastern and Western Cherokees. When the Delawares were incorporated into the Cherokee Nation, under article 15 of the treaty of 1866, between the United States and the Cherokee Indians, providing for the incorporation of friendly Indians, and when the Shawnees were in a like manner brought into the Cherokee Nation, each tribe paid the price in money into the national fund of the Cherokee Nation; but, more than that, when their rights were questioned each was able to turn to the treaties and point out the exact words upon which they relied and upon which they asked the court to pass judgment. And these were, with regard to the Delawares:

"For and in consideration of certain payments, and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares for their occupancy, a quantity of land. * * * Nor shall the continued ownership or occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon citizens thereof. On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided. And the children born to such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

A similar provision was the basis of the Shawnees' right. The treaty of 1866, in the ninth article thereof, declared that the freedmen should have all of the rights of a native-born Cherokee.

In view of the history of how each component part of the citizenship of the Cherokee Nation acquired a property right therein, and of the express wording of the treaties, clearly defining the rights of each party in the lands of the Chero-

kee Nation, and considering the total absence of any such provision relative to the intermarried white citizens of the Cherokee Nation, how unfortunate is it for them to have invited comparison with the acquired rights of other members of the Cherokee Nation, and to have suggested that three times the Cherokee Nation had unsuccessfully invoked the distinction between a Cherokee by blood and other members of the tribe, who were Shawnees, Delawares, and freedmen. It can but accentuate the fact that the intermarried white citizen is the only person who has asserted a right which he cannot account for. It necessarily brings up the question as to why he has gone all of these years, throughout all of the payments of moneys made by the Cherokee Nation to every other citizen thereof, without asserting any claim, and that, too, when ever since the adoption of the Code of 1874-'75 there has been a continuous enabling act allowing any citizen of the Cherokee Nation to go into the courts thereof for the purpose of establishing any claim he might have against the nation.

"To get at the purpose and intention of the parties, we have a right to consider the construction the parties to the instrument, and who were affected by it, have given it, and what their action has been under it."

United States *vs.* Payne, 2 McCrary Rep., 295 (8 Fed., 888).

The United States has recognized the rights of the Cherokee Nation to make and construe its own laws as to who are entitled to citizenship therein, and the intermarried whites must stand upon the laws of the Cherokee Nation.

Talton *vs.* Mayes, 163 United States, 376.

Mehlin *vs.* Ice, 56 Fed., 19.

Cornells *vs.* Shannon, 63 Fed., 306.

This court has said:

"The Cherokees are governed by their own laws. As a

people they are more advanced in civilization than other Indian tribes, with the exception perhaps of the Choctaws."

Mackey *vs.* Coxe, 18 Howard, 102.

And again:

"The Cherokee Nation has many of the rights and privileges of an independent people. They had their own constitution and laws, and powers to administer their internal affairs."

Delaware Indians *vs.* Cherokee Nation, 193 U. S., 144.

It was said in Cherokee Trust Funds Case:

"If the Indians in that State, or any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be *readmitted* to citizenship as there provided."

Cherokee Trust Funds Case, 117 U. S., 311.

The laws of the Cherokee Nation control and these laws have never conferred a property right on claimants.

Third. The Acts of Congress.

It is confidently asserted by the claimants that the act of Congress of July 1, 1902, ratified by the Cherokee Nation August 7, 1902, commonly called the Cherokee agreement, settles the question in their favor in positive terms.

The first portion of this act upon which they rely is as follows:

"Section 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes."

This is followed by a provision that "no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation," and by the further provision as follows:

"SECTION 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section 21 of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page 495), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page 221)."

"SECTION 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall from time to time, and as soon as practicable, forward to the Secretary of the Interior, lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which the allotment of land and distribution of other tribal property shall be made."

Act July 1, 1902 (32 Stat., page 716).

In the inception we find that the roll of citizens of the Cherokee Nation shall be made up as of September 1, 1902, and of persons then living and *entitled* to enrollment on that date. The following section provides that all persons living at the date mentioned, who are *entitled* to be enrolled as provided in the previous section, shall be placed upon the roll. And again, in section 29, we find that on the lists to be finally approved by the Secretary of the Interior there shall be placed only the names of those persons found to be *entitled* to enrollment. Thus the whole measure is qualified.

It is also provided that the roll shall, in other respects, be made in compliance with the acts of Congress of June 28, 1898, and of May 31, 1900. The act of June 28, 1898,

directs the Commission "to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living, whose names are found on said roll, * * * with such intermarried white persons as may be *entitled* to citizenship under the Cherokee laws."

Here the purpose of Congress is disclosed, to confine the beneficiaries to such persons as are *entitled under the laws of the Cherokee Nation*. Confirming the 1880 roll made by the Cherokees, which was a census roll, did not mean to create any rights which citizens of the Cherokee Nation had not before enjoyed. With reference to the act of June 28, 1898, this court has said:

"It may be remarked that the legislation seems to recognize, especially the act of June 28th, 1898, a distinction between admission to citizenship merely, and the distributive share of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from a concession of the former."

Stephens *vs.* Cherokee Nation, 174 U. S., 488.

The Court of Claims, in speaking of this feature, says:

"It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs, or to confer upon white citizens property which they were not legally entitled to have. The term 'citizens' in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of lands."

Record, page 41.

The purpose of the confirmation by Congress of the 1880 roll is disclosed by all of the acts passed by Congress in this regard. It is clear that it was never intended to be anything more than a basis for making up a roll of citizens. The act

of 1898, section 21 thereof, is in reality a statement that no previous act of Congress is intended to confirm any other roll of the Cherokee Nation.

The words "authorized and directed" should be construed as directory and not mandatory.

"While words are affirmative and relate to the manner in which a power or jurisdiction vested in a proper officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and even have been construed to be directory."

Sutherland on Stat. Const., p. 447, and cases cited.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, and it will always be presumed the legislature intended exceptions to its language which would avoid results of this character."

U. S. *vs.* Kirby, 7 Wall., 482.

Tsoi Sim *vs.* United States, 116 Fed., 926.

Holy Trinity Church *vs.* U. S., 143 U. S., 472.

"Literal language will be disregarded where it involves results not contemplated by Congress."

U. S. *vs.* Freight Asso., 166 U. S., 355.

Knowlton *vs.* Moore, 178 U. S., 77.

"The undoubted purpose of the statute as a whole should be the criterion."

Scott *vs.* Latmer, 89 Fed., 846.

Kohlsatt *vs.* Murphy, 96 U. S., 153.

"Exceptions may be presumed or words omitted or supplied when it is necessary to accomplish the obvious intent of the law-maker or prevent injustice."

Davis *vs.* Bohle, 92 Fed., 328, and cases cited.

In the case of Minnesota *vs.* Hitchcock, 185 U. S., 396, this court, after referring to Worchester *vs.* Georgia, *supra*, quotes from Choctaw Nation *vs.* United States,119 U. S., as follows:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the later is placed under the care and control of the former, and which while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

It will be borne in mind that the ratification by the Cherokee Nation of the act of Congress of July 1, 1902, was under the pressure of previous radical legislation by Congress shaking to the foundation the entire established order even to the national existence of Cherokee government. Particularly is this true of act of Congress of June 28, 1898.

On May 31, 1900, Congress again made reference to how these rolls should be made up by the Commission to the Five Civilized Tribes, and provided that the said Commission should not receive or entertain the application of any person who had not theretofore been placed upon some roll of the Cherokee Nation. There was the 1880 roll, made eighteen years prior to the passage of the 1898 act, on the one hand, and there was the constitutional limitation in the Cherokee constitution that all persons, whether on the 1880 roll or not, who removed from the nation, taking all their goods and effects, and who should become the citizens of another government, should forfeit all rights in the Cherokee Nation; and it cannot be said that Congress had either the power or the intention to rehabilitate such as had forfeited their rights.

Section 31 of the act of July 1, 1902, says that no person whose name does not appear on the roll to be made by the Commission to the Five Civilized Tribes "shall be entitled to

in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act."

In other words, the roll must be made up of citizens who *under the laws of the Cherokee Nation* are entitled to participate in the distribution of the common property of the Cherokee tribe. So we return to the point from which we started, that the intermarried citizen must found his claim in the laws of the Cherokee Nation. It is clear that the claims of the intermarried citizens winnow to the proposition that they have been given this right by recent acts of Congress. They know that they are confronted by half a century's acquiescence in the condition that they have not enjoyed property rights or any other than personal, political, and civil rights, and that in the face of a continuous act of the Cherokee Nation, in force ever since the Code of 1874-'75, enabling them to assert any rights which they claimed. They know that during all of the series of events which culminated in the payment of the Shawnees, the Delawares, and the freedmen of the *per capita* of each in the funds derived from the sale of the Cherokee Outlet they did not once assert any claim in themselves. It is strange that after a lapse of fifty years they should thus appear and rest their case upon some recently made enactments of Congress, alleged to give them rights which they have not before enjoyed.

The statement was made in the Court of Claims:

"It is, and has always been, not only the custom of the Cherokees, but of all Indian tribes, to adopt white men as members of their tribes, and in most if not all cases, membership carries with it the rights enjoyed by members by blood."

Brief on behalf of claimants, page 184.

Did anybody ever hear of a claim of intermarried citizens put forth by that class in the Creek or Muskogee Nation in the Indian Territory, or by the Cherokee Nation, until based

on these recent acts of Congress, providing for the dissolution of the nation and the distribution of its property? Have counsel ever stopped to consider what the Choctaws and Chickasaws in the Indian Territory based their claim upon? With regard to these nations it is by *treaty* distinctly set forth in article 26 as follows:

"The right here given to the Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarried, of either of said nations, or who may *hereafter* become such."

And further, article 38:

"Every white person who, having married a Choctaw, or Chickasaw, resides in the Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw or Chickasaw Nation, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

There those Indians provided for property rights in one paragraph of the treaty, and for political rights in another. If the Cherokee Nation had intended to confer a right in the lands and vested funds thereof, upon the intermarried white citizens, does it not seem somewhat remarkable that they have never said so? As when dealing with the laws of the Cherokee Nation the claimants have been compelled to rely upon construction, so when their claim, based upon the recent acts of Congress, is sifted, it comes down to the same point. Scrutinize their construction of the act of 1902, and how can it be made anything more than an inference which they urge in favor of themselves?

But it is insisted that the act of 1902 was a treaty. Certainly it was not an instance where the two parties met in convention, as of old, but when Congress had passed the act

and submitted it to the Cherokee Nation, with the clause relied upon by the claimants in it, it was by the Cherokee Nation ratified, but it would not have been but for the vote of the intermarried white citizen. Then it follows that he voted to himself whatever benefits might accrue under this act (Record, page 60). Certainly as affecting this question this cannot be called a treaty.

Going back to the history of the acts of the Cherokee Nation itself, and gleaning therefrom its attitude upon the question of the desire of the white man to share in the lands and moneys of the Cherokee Nation, it is improbable that the act of Congress passed July 1, 1902, would have been ratified by the Cherokee Nation if it had been more clear then that the white intermarried citizen expected to make this the basis of his claim to a distributive share in the lands and moneys of the nation, which up to that time had been withheld from him.

But look at the provision itself. True it may be said that there is no use in saying that a citizen married since the sixteenth day of December, 1895, should not participate in the distribution of the lands and funds of the nation, if a citizen married before that date was not to do so; but admitting this suggestion for all it is worth, it must also be agreed that it is a very poor form for a land grant. If these claimants had no other claim until the passage of that act, and must take the clause in that conversely in order to acquire a property right not before enjoyed, the weakness of their position is exposed. There is one thing certain, that provision of that act of 1902 will never be any more clear than it was then made. Will this court say that such an act submitted to the Indians in such a way is sufficient upon which to base a judgment which would take from them approximately 300,000 acres of land, to say nothing of the fund?

Unless the decisions of this court to the effect that language should never be construed to the prejudice of the Indians are to be departed from it is difficult to see how these claimants

can hope to acquire by construction valuable property rights which it is manifest the Indians never intended to confer.

Worchester *vs.* Georgia, 6 Peters, 515, 582.
United States *vs.* Kagama, 118 U. S., 375.
Jones *vs.* Mehan, 175 U. S., 11.
Minnesota *vs.* Hitchcock, 185 U. S., 396.
Choctaw Nation *vs.* U. S., 119 U. S., *supra.*

"Married Out and Abandonment Cases."

Referring to the claim denominated "Married out and abandonment cases," that point seems to be fully concluded against the claimants in the following language:

"To say that a white man can share in the property of the Cherokees for the reason that at one time in his life he was the husband of a Cherokee woman, and to say that this court or the Secretary of the Interior must hold that he is still the husband of the Cherokee woman because the contrary has not been established in another proceeding, is an appeal to technicality which this court cannot uphold. These claimants like other plaintiffs must prove their case; asserting a present right, they must establish present conditions. The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage, and that when marriage ceased, with a special reservation in favor of widows and widowers, citizenship ceased; that when an intermarried white person married a person having no rights of Cherokee citizenship by blood, it was conclusive evidence that the tie which bound him to the Cherokee people was severed, and the very basis of his citizenship obliterated."

Record, page 42.

There is in this point additional evidence of how the Cherokees guarded their estate. When the wife or husband of the white intermarried citizen died, the widow or widower forfeited the right to reside in the Cherokee Nation, if he

married again any other than an Indian by blood. At first this might, in a given instance, seem harsh. Take the case of a white man and a white woman, both of whom had become by the marriage laws of the Cherokee Nation entitled to reside there, and who had made that country their respective homes. If they married each other, why should they forfeit the right to live in the Cherokee Nation? And yet from the Indian viewpoint the reason is obvious. The right of the children of those persons to so reside would follow. The Indian did not intend to accord even the slightest recognition to any person other than an Indian, except *while* the husband or wife of an Indian.

Compilations of 1880 to 1892.

The clause "Provided, also, that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation" has been said by counsel for the intermarried citizens to have been repealed, and that the requirement for the payment of five dollars additional, found in the act of 1880, was enacted in its place. It is believed that some impatience may be confessed and excused as to this argument. If the act of the National Council, leaving aside the question of the constitutionality of that act, which attempted to confer a right in the lands and vested funds of the Cherokee Nation upon the payment of $500, was so unpopular as to force its repeal within two years, it ought not to be urged that three years later the same right was conferred upon the payment of five dollars.

The proviso above referred to, expressly giving notice, if it may be so termed, that the rights and privileges "shall not extend to right of soil or interest in the vested funds of this nation," has been the law of the Cherokee Nation ever since November 28, 1877, as is undeniably shown by the record.

Some discussion was indulged in in the Court of Claims about the compilations of 1880 to 1892, but it does not appear to be important here. The action of the compiler of the acts

of the National Council, published in 1881, in omitting a part of section 75 of the Code has been spoken of. The fact that he ended the section with the identical words referred to in the amendment, although not at the right place, indicated that it was an unintentional error.

The act providing for this collection or compilation of the laws contained no provision making them effective as the laws of the nation when so collected and compiled, nor did the National Council have power itself to delegate its legislative functions. It was not a code of laws, under and by authority of the National Council. The work of the compiler was required to be approved before the chief issued the warrant for his compensation, and not to make the collection any more effective as law, because the chief alone could not make or change the law. The same may be said of the compilation of 1892. This collection was provided for by an act practically identical with that of 1880. The same compiler was selected, and the error in this chapter was not corrected. His work in this compilation consisted of adding to the compilation of 1880 the laws and amendments which had been passed by the National Council since it was made, and left it otherwise unchanged. Neither did the act providing for this collection or compilation provide that it should, when made, become effective as the law. Doubtless they were accepted and admitted as correct; but wherever it could be shown an error had been committed by the compiler, the original act of the legislative body, approved by the executive, was and is the law beyond any question. But it is useless to argue this.

In the language of Mr. Chief Justice Nott, in the Court of Claims in this case:

"In 1874 the rapidly growing value of the Cherokee lands was becoming perceptible. * * * No restrictions appear to exist in the constitution which would forbid the National Council from admitting white men to citizenship upon the condition that they should not acquire an estate or interest in the communal property of the nation. Accordingly the National Council enacted what was already the law by im-

plication, an express proviso to section 75 of the Code of 1874 'that the rights and privileges herein conferred (the right of white citizens to acquire citizenship by intermarriage) shall not extend to right of soil or interest in the vested funds of this nation;' which provision, however did not take effect until November 1, 1875."

Record, page 39.

It will be borne in mind that all of that part of the provision of section 75 following the words "this nation," giving the right to the intermarried citizen upon the payment of $500 to acquire a property right in the said nation, was struck out by the amendment of November 28, 1877, and that the law has so remained, unchanged, from that date.

In so far as the judgment of the Court of Claims contravenes the laws of the Cherokee Nation and the acts of Congress providing that only those who are entitled to participate in the distribution of the property of the Cherokee Nation by virtue of its laws, and which adjudges and decrees that such white citizens residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the first day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and in any funds derived by lease, sale or otherwise from the lands of the Cherokee Nation, conveyed to it by the United States by the patent of December, 1838, it should be modified so as to hold that none of such intermarried white citizens are entitled to share in the funds and lands of the Cherokee Nation, whether married prior to or subsequent to the first day of November, 1875, and as so modified it should be affirmed.

EDGAR SMITH,
Attorney for Cherokee Nation.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted] 125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted] 126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. [redacted] 127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted] 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

REPLY BRIEF FOR CHEROKEE NATION.

EDGAR SMITH,
Attorney for Cherokee Nation.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20414

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

REPLY BRIEF FOR CHEROKEE NATION.

The effort of counsel to show that the inquiry warranted in this hearing is limited to holding that the intermarried white citizens are entitled to be enrolled as such, and that the effect

of such enrollment, as to property rights, will remain a question to be determined subsequently, is marked by refinement rather than force. Clearly it was not a proper question to submit to this court as to whether an enrollment of the names of the intermarried white citizens should be made for purely ornamental purposes.

The question of their claim to property rights is, and has from the first been, the gist of the matter. Indeed, it is difficult to reconcile counsel's argument that the only question for the court to determine is who are citizens of the Cherokee Nation, with their insistence that the acts of Congress recognized the rights of the white intermarried citizens to a distributive share of the lands and money of the Cherokee people *because* they are citizens.

Moreover, the act of Congress of March 3, 1905 (34 Stat. L., page —), as set forth on page 36 of the record, authorizing final judgment in the Court of Claims in this case with appeal to this court, should end all discussion as to this feature.

It is an easy transition to some of the other contentions urged. It is said at the close of page 7 of counsel's brief that the "whole policy of the Indians and the Government has been changed; that is, that of isolation and exclusiveness." This is fortified by a report of a Senate committee of May 7, 1904, to the effect that the blame rested wholly on the Indians, and that they had adopted the whites to citizenship and *invited* white people to come within their jurisdiction.

This information would come with better grace were it not for the fact that at that time almost every page of the Cherokee laws portrayed an unalterable purpose to exclude the white man from any interest in the property of the Cherokee people. A person not a citizen of the Cherokee Nation could not own a town lot in the segregated town sites sold by the National Council of the Cherokee Nation. He could not have a mercantile business. He could not even be employed as a day laborer by a Cherokee citizen, unless a permit was

issued by the constituted authorities of the Cherokee Nation. There were many other provisions of a like nature.

The statutes of the United States, sections 2134, 2135 and 2147 and 2148 (R. S., 372-374), enacted in 1834, remained in force. The treaty of 1866 between the Cherokee Nation and the United States provided that all persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation or remaining in the same, except as therein provided, and made it the duty of the Indian agent to remove them. But just a year before this report of the Senate Committee in 1894—that is to say, in 1893—in a solemn treaty between the United States and the Cherokee Nation, the United States again agreed to remove all white persons who were intruders from the Cherokee Nation (see page 8 of first brief for Cherokee Nation).

We are not informed as to just when the "whole policy of the Indians and the Government" changed, or when they emerged from isolation and exclusiveness, but, judging from the laws in force, those who thought that those laws were to be taken as *inviting* white people to come within the Cherokee Nation have an unusual conception of an invitation.

Much stress is laid on the 1880 roll. The broad view that Congress never intended by any act to take from the Indians that which was constitutionally theirs, and confer upon these claimants any rights which they had not before enjoyed, answers what has been urged for the act of Congress of June 28, 1898, as well as the act of July 1, 1902.

However, it may be suggested that as section 21 of the act of June 28, 1898, stands, it presents a peculiar feature. After the recital concerning the 1880 roll comes the following:

"And they shall investigate the right of all other persons whose names are found on any other roll and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such persons as may have lawful right thereto, and their descendants, born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*

The words italicized conclude the provision for making up the roll. It is the first reference to the intermarried white person. Does it not appear that Congress had in mind in all that preceded this clause the Indian citizen? Does not this make a distinctive provision as to intermarried class, and is it not an express limitation that only such white persons shall be enrolled as may be entitled to citizenship under *Cherokee laws?*

In the first brief for Cherokee Nation the qualifying effect of the terms, "entitled to enrollment," as they occur all through the act of Congress of July 1, 1902 (32 Stats., page 716), is argued.

It is difficult to see what bearing the line of decisions cited by counsel for claimants, touching political rights and jurisdiction, can have.

Nofire *vs.* United States (164 U. S., 657) decided nothing except as to the citizenship of deceased and consequent want of jurisdiction in the United States court to try defendant for the crime of murder.

Raymond *vs.* Raymond (83 Federal, 721) is decisive of nothing except that the adoption into the Cherokee Nation of a white person, a citizen of the United States, ousted the jurisdiction of the federal court between that adopted citizen and another member of the tribe, and that the jurisdiction of the tribal courts was exclusive.

The court in this case said:

"His adoption into one of these tribes has the effect of bestowing on him the privileges and immunities of its members, but it has no greater effect."

This was a divorce suit.

McClellan *vs.* Pyeatt (66 Federal, 843) goes to the point that an adopted citizen could be held as trustee, under certain conditions, for money with which improvements on the public domain of the Cherokee Nation had been purchased and the improvements sold.

Nivens *vs.* Nivens (76 Southwestern, 114, and 133 Federal Reporter, 40), is of the same general character.

When testimony of counsel is offered to supply the fact that Betty Nivens was a white intermarried citizen, and that it cannot be gleaned from the decision of the United States circuit court of appeals, eighth circuit, that such is the case, it becomes clear that nothing in point here was before that court. A reading of that case discloses that nothing affecting the issues in this case was decided. When it is remembered that the only controversy the two parties could have had in this case concerning "a division of the farm of Moses Nivens" was a dispute as to who would be entitled to receive the land as an allotment, under laws which gave preference to the owner of the improvements upon that farm, it is apparent that when the parties each took an allotment of the land in question Betty Nivens was left in exactly the same position as that occupied by hundreds of others of the white intermarried citizens referred to by counsel, who have had allotments reserved for them, tentatively, pending the determination of this suit, and with nothing decided which in any way assisted in aiding her claim, along with other intermarried citizens, to ultimately receive an allotment of land in the Cherokee Nation.

If more light is needed as to this case, a quotation from the court of appeals in the Indian Territory is pertinent. The court says:

"As the only question in this case now is, as to whether the distribution of the estate of Jeff. Nivens should have been under the Cherokee or Arkansas law, we will confine ourselves to that issue."

76 S. W., 114.

It will be borne in mind that the only right which could have been in issue was as to the ownership of the improvements, which right went no further than to give the owner the preference in taking a particular allotment, provided

that person had established or should establish a legal right to receive an allotment in the Cherokee Nation.

The whole doctrine of improvements on the public domain of the Cherokee Nation appears to have been to treat the houses and other improvements just as would be treated those of a tenant who had erected improvements under a stipulation that they remain his. The land was the common property of the Cherokees and those to whom they had, by express grant, conveyed an interest therein. Any citizen of the Cherokee Nation could use the public domain, *and as much thereof as he chose,* and the improvements thereon were bought and sold just as personal property was conveyed.

In passing, it may be said that it has not been urged by the intermarried whites that they failed to get their share of the use of the public domain. The fact that the benefit of the public domain, through all these years, was one of the privileges which they enjoyed, free from tax or burden, as sojourners with the Indians, is a very poor reason to assign for now modestly requesting land which has never been granted to them and for which they have never paid.

In this connection the citations at pages 40 and 41 of brief for claimants, referring to the act of Congress of 1888 (25 Stats. L., 392) and the Act of May 2, 1890 (26 Stats., 81), may be noticed. It is asserted that the act of 1888 recognized the fact that citizens by intermarriage "in some" of the Five Civilized Tribes were entitled to share in the property of the tribe. This is true of the Choctaws and Chickasaws, alone, of the Five Tribes, and is distinctly provided by their treaty with the United States of 1866, in article 26 thereof, cited at page 44 of first brief for the Cherokee Nation.

The argument as to the 1890 act of Congress, *supra,* as set forth on page 41 of counsel's brief, is as follows:

"Congress again, by an act which put over the Indian Territory a system of organic laws on May 2nd, 1890, 36 Statutes, 81, provided that in case of judgments gotten against an adopted citizen of any of the Five Civilized Tribes, the creditor could not sell the improvements of such adopted

citizens, unless he shall be the owner of improvements on real estate in excess of 160 acres, thus recognizing the standard allotment of Indian citizens, and recognizing when allotments came to adopted citizens they would still have improvements on the real estate of the nation sufficient to entitle them to standard allotments, and further recognizing that the adopted white citizen had the same rights in the Cherokee Nation that the Indian by blood had, so far as the public domain was concerned," etc.

Just how Congress *thus* recognized 160 acres as the standard allotment for the different tribes in the Indian Territory it is not easy to understand. The Chickasaws were allotted 320 acres each; the Choctaws, 320 acres each; the Seminoles, 60, 120, and 240 acres, according to classification of the land; the Cherokees received 110 acres each.

But the act appears to be cited to prove that Congress recognized "that the white adopted citizen had the *same* rights in the Cherokee Nation as the Indian by blood had so fas as the public domain was concerned." This is just what the act of Congress did *not* do. It must have been forgotten that the act made a clear distinction between the ownership of improvements on the public domain in the Indian Territory possessed by an Indian by blood and by adoption. If the party was an adopted citizen his improvements could be subjected to the payment of his debts in the way pointed out in the act. If he was a citizen by blood his improvements could not be subjected in any manner. This act was so construed by the United States circuit court of appeals, eighth circuit, in the case of Daugherty *vs.* Bogy, 104 Federal, 938. The act referred to by counsel is set out in full in the opinion of the court in that case, and the Cherokee Nation is not reluctant to submit this act and its construction, in connection with supposed congressional recognition that the white adopted citizen had the same rights in the Cherokee Nation that the Indian by blood had, so far as the public domain was concerned. It does not seem to be of serious moment, however, because if the same rule had applied to adopted

citizens and citizens by blood, relative to the improvements upon the public domain, it would not be forgotten that the land was the common property of the Cherokee people and those to whom they had, by express grant, conveyed an interest therein, and that the disposition of the improvements upon that domain does not involve the question of the right to the land itself.

The same reasoning applies to all the decisions cited, touching the rights of adopted citizens to take by inheritance or otherwise anything in the nature of an improvement upon the public domain.

Considerable labor has been devoted by counsel in an effort to avoid the force of the act of the Cherokee national council of November 28, 1877. It does not appear to be necessary to pause to argue this question. The Court of Claims found as a fact that it was in force. It was put in issue by the pleadings and found as a fact. The court does not take judicial notice of the laws of the Cherokee Nation, but they must be alleged and proved as any other fact (Wilson *vs.* Owens, 86 Fed. Rep., 57). The finding of the Court of Claims with reference to this fact is conclusive.

It may be said, however, in passing, that such cases as Pearson *vs.* International Distillery Co. (34 N. W., 1) and Barrowdale (39 Federal, 376) do not support the position of counsel.

In the first of these cases the court uses this language:

"Counsel contends that the statute is, in effect, repealed by non-user; that is to say, it has been so long without enforcement it is obsolete. Surely it will not do to hold that this statute, though not enforced, ceases to have due force of law. * * * We know of no principle which supports such doctrine."

And in the Barrowdale case, referring to the question of omission from a compilation, the court says:

"I say *'prima facie,'* for it certainly may be shown by a comparison with the original roll that there was an error, either of omission or commission."

All of the evidence relative to the Code of 1874-75 and the act of November 28, 1877, was heard by the Court of Claims and the fact concluded.

It is urged that what counsel regards as contemporaneous construction of the acts of June 28, 1898, and July 1, 1902, by the Commission to the Five Civilized Tribes in the Indian Territory is important. Just here it becomes necessary for the Cherokee Nation to say that there are so many references to matters which are not in the record in this case, and so many things incorporated into the brief of counsel for the claimants which are not disclosed by the record—as, for instance, pages 33, 34, 35, and 36 of their brief, and references on page 40 thereof to certain alleged agreements between the Cherokee Nation and the United States—that it is impractical for the present counsel of the Cherokee Nation to admit anything not shown by the record, for want of time to see that no mistake has occurred, if for no other reason. The Cherokee Nation wishes to be understood that it does not waive anything, or admit anything, not disclosed by the record. But if it were necessary to answer the question, What is the effect of the action of the Commission to the Five Civilized Tribes in the matter of enrolling persons in the Cherokee Nation, my pronouncement is that it is not material.

Among the cases cited by counsel in this regard is that of United States *vs.* Tanner, 147 U. S., 661. That case reversed the judgment of the court below that the petitioner was entitled to recover, and the following language is used:

"If it were a question of doubt, the construction given to this class * * * might be decisive; but as it is clear to us that this construction was erroneous, we think it is not too late to overrule it."

This case refers to United States *vs.* Graham, 110 U. S., 219, and Swift & Company *vs.* United States, 105 U. S., 651.

The syllabus, in part, of Swift & Company *vs.* United States, *supra,* is as follows:

"The provisions of the statute being clear to that effect, he is entitled to recover pursuant thereto, although a different contemporaneous construction of them was given by the bureau, it not appearing that he acquiesced therein."

And in United States *vs.* Graham, *supra,* this court says:

"Such being the case, it matters not what the practice of the Department may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such practice, begun so early and continued so long, would be of the highest degree persuasive if not absolutely controlling in its effect; but with language clear and precise and with its meaning evident, there is no room for construction and consequently no need for anything to give it aid. The cases to this effect are numerous."

That case arose on application of officers relative to fees claimed by them as such. When those facts are considered it is clear that the cases are of little applicability here. Taken alone they do not help the claimants. Moreover it will not be forgotten that if construction be due, these claimants are white men arrayed against the Indians, seeking to inject into an agreement between the United States and the Cherokee Nation alleged rights to property in themselves.

They are within the rule announced in Minnesota *vs.* Hitchcock, 185 U. S., 396. In fact within the rule that language should never be construed to the prejudice of the Indians, which has been enforced by this court ever since the case of Worchester *vs.* Georgia (6 Peters, 515, 582). Here the Cherokee Nation is contesting the claims of the intermarried whites. So is the Indian by blood. The intermarried whites rely upon the language of the United States to give them an interest in property which has always belonged to the Indians, and must in the last analysis rest upon construction in lieu of an express grant anywhere or in any manner conferred. It ought not to be urged that the

intermarried white citizen has acquired any right because the Dawes Commission enrolled him, or the Secretary of the Interior approved the roll, if such facts could be said to be before the court. There has been no acquiescence either by the Indians or the Cherokee Nation, but, on the contrary, a protest.

In an apparent struggle to find something to support counsel's general argument as to the recognition of the intermarried white citizen, they assert at page 38 of their brief that the *chief* question of the Cherokee campaign of 1898 was whether or not "any agreement which the nation would make or have to submit to should provide for the participation of all alike, *including the adopted white,* in the distribution of the common property of the nation," etc., and we are informed that the Downing party is composed largely of intermarried citizens, and that the secretary who signed the platform of that party is a citizen by intermarriage and a party to this suit.

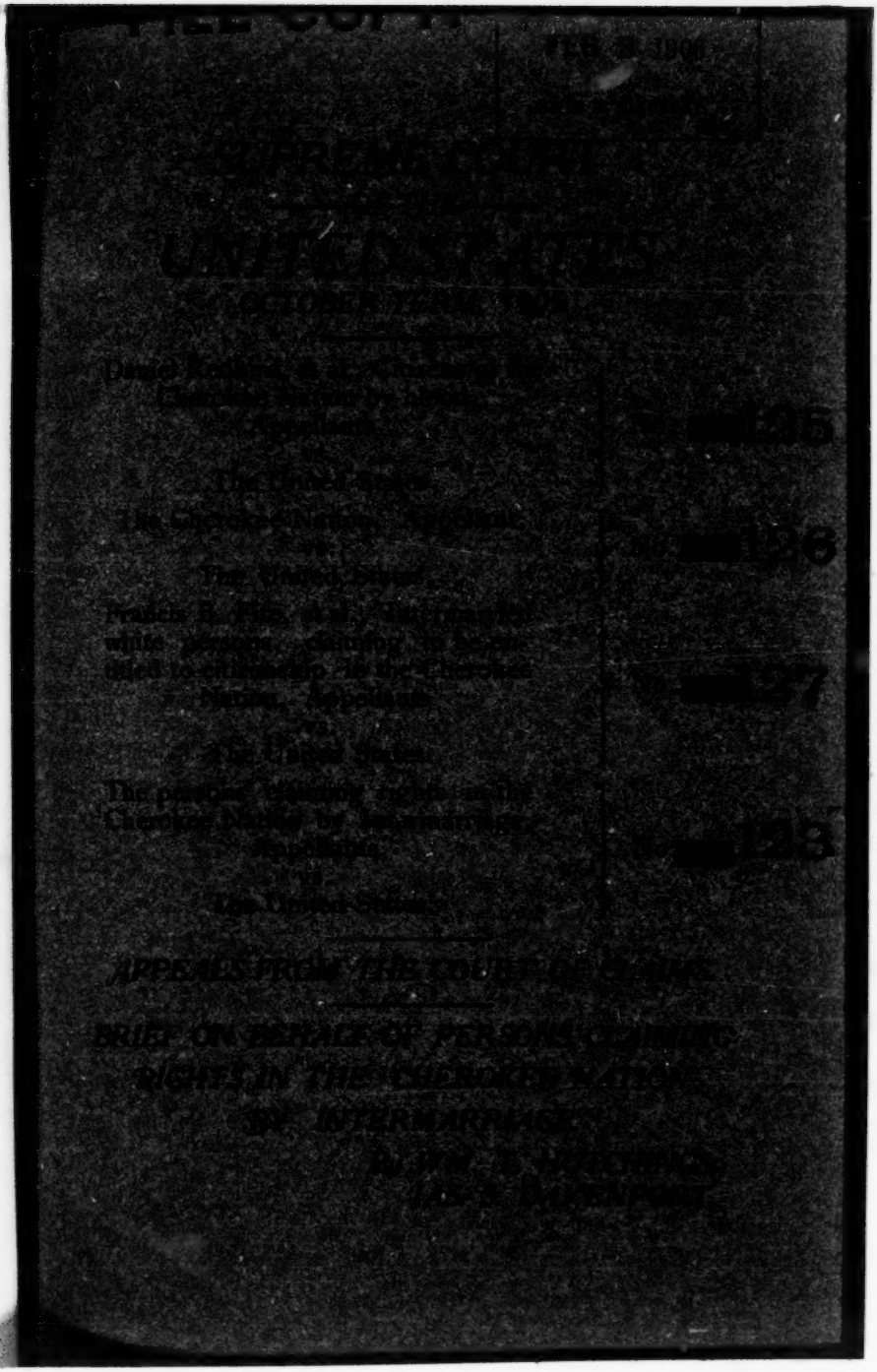
It is treating the record with extreme disregard to ask to submit to this court the question as to just what constituted the chief issue of the Cherokee campaign, but since inspection of the platform, which is set forth on page 39 of counsel's brief, is invited, it may assist in exposing the true position of these claimants. The declaration of the platform is not in strict accord with counsel's language as to what the chief question of the campaign was. The platform carries the declaration that it is for a division of the property of the Cherokee Nation "among all the citizens of the Cherokee Nation." Counsel incorporates in his statement the express provision "including the adopted whites." Why did the platform omit the express provision "including the adopted whites"? It was given birth by the party "composed largely of intermarried citizens" and signed by a secretary who himself was an intermarried citizen and one of the parties to this suit. Why did these people rest on the word "citizens"? It argues that they were afraid to make it more clear. As long

as it could be *explained* to a real Indian that "all citizens of the Cherokee Nation" did not include the intermarried whites, and, on the other hand, to the adopted white that it did mean him, it was not bad for a political platform.

But it argues more. It points to those parts of the recent acts of Congress which appear to have been injected into the different measures. It may be said to bear testimony to a studied, continuous effort recently put forth by the intermarried whites, on the eve of the dissolution of the nation, to acquire a distributive share of this property, and also that they have never put the issue fairly and squarely. The veiled provisions will not now avail them. It is too apparent that they have never, by any express terms, acquired a property right, and that they knew they were not entitled to it, and acquiesced in this view for more than half a century.

They should not now acquire by construction what is, in round numbers, a one-thirteenth of the lands and vested wealth of the Indians.

EDGAR SMITH,
Attorney for Cherokee Nation.



SUPREME COURT

——OF THE——

UNITED STATES

OCTOBER TERM, 1905.

Daniel Redbird, et al., Citizens of the Cherokee Nation by blood, Appellants vs. The United States.	No. 419
The Cherokee Nation, Appellant, vs. The United States.	No. 420
Francis B. Fite, et al., Intermarried white persons, claiming to be entitled to citizenship in the Cherokee Nation, Appellants vs. The United States.	No. 421
The persons claiming rights in the Cherokee Nation by Intermarriage, Appellants, vs. The United States.	No. 422

APPEALS FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This case arose through the submission by the Secretary of the Interior, on the 24th day of February, 1903, of certain controverted questions arising as to the right of the Commission to the Five Civilized Tribes under an act of Congress July 11, 1902, (32 Stat., 716-720) to enroll a large number of citizens of the Cherokee Nation who claimed rights of citizenship by intermarriage with certain citizens of said Cherokee Nation under Cherokee laws, "so as to recognize their rights to participate in the distribution of the common property of the Cherokee Nation, of whatever kind or character."

These questions were submitted to the Court of Claims for findings and opinion in accordance with the provisions of section two of the Act of Congress of March 3, 1883, known as the "Bowman Act." (22 Stat. 485.) The letter of submission is as folows:

"Department of the Interior,
February 24, 1903.

To the Court of Claims:

Sirs: By section 21 of the act of June 28, 1898, (30 Stats., 498. 502), the Commission to the Five Civilized Tribes, was directed to make rolls of citizenship of the several tribes, enrolling, among others, 'such intermaried white persons as may be entitled to citizenship under Cherokee laws.' By the Act of May 31, 1900 (31 Stats., 221, 236), said

Commission was authorized to continue the exercise of authority theretofore conferred on it by law with a direction as follows: "But it shall not receive, consider or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.'

By the Act of July 1, 1902 (32 Stats., 716, 720), further direction was given as to the making of the rolls of citizens of the Cherokee Nation as follows:

Sec. 25. The rolls of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living, and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

Sec. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermaried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

Sec. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred, (Thirty-first Statutes, page two hundred and twenty-one).

A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens, and a protest has been filed with this department on behalf of a large number of citizens of the Cherokee Nation by blood, against the enrollment of intermarried persons 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Naiton of whatever kind or character.' It is asserted on the one hand that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the Naiton, and, on the other hand, that the Cherokee laws, as well as the laws of Congress recognize those per-

sons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such Nation entitled to share equally with full-blood citizens in the property of the tribe.

The controverted questions involved in this matter now pending before this Department, are respectfully submitted for your findings and opinion in accordance with the provisions of Section 2, the Act of March 3, 1883 (22 Stat. 485). The protest referred to, which states the questions involved, is enclosed herewith, and upon receiving information that any other papers in the possession of the Department are needed they will be properly transmitted.

Very respectfully,

E. A. HITCHCOCK, Secretary."

A considerable amount of evidence was taken in this case and stipulations made as to the parties before the Court, and all laws of the Cherokee Nation touching the subject presented to the Court below either by their introduction in evidence or from copies or compilations admitted to be correct. The parties to the controversy are found in the record from page 43 to page 50, inclusive; in fact, there was scarcely any dispute about the evidence or any contention arising thereon, except as to its application under the law; so, there could be very little error as far as the findings of fact are concerned. The conclusions of law are short, and found on page 61 of the record, and are as follows:

"That such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermariage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermaried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the rights of soil or interest in any of the vested funds of the Cherokee Nation, and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of

any of the funds belonging to said nation, and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1st, 1875, and those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives have no part or share in the Cherokee property and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people and are not entitled to be enrolled for such purpose."

We think that the conclusions are erroneous *in toto,* except the findings that those who married prior to the 1st day of November, 1875, have the same rights as to lands with Cherokee Indians by blood. We contend that the other part of the decision is entirely erroneous in restricting the rights which they acquire in the funds belonging to the Cherokee Nation.

We therefore, ask that the decision of the Court, except in so far it admits the rights of such citizens to the lands, may be reversed.

ASSIGNMENT OF ERRORS.

The Court below erred in holding:

First: That white persons who married Cherokee Indians by blood subsequent to the enactment of the Cherokee law which became effective on November 1st, 1875, had due notice of the limitations set upon their rights and privileges as citizens.

Second: That those white persons who married Cherokee citizens by blood prior to November 1, 1875, acquired no rights, and have no interest or share in any funds belonging to the Cherokee Nation, except where such funds are derived by lease, sale, or otherwise from the lands of the Cherokee Nation, conveyed to it by the United States by the patent of February, 1838.

Third: That the rights and privileges of those white citzens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the rights of soil or interest in any of the vested funds of the Cherokee Nation, and that such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said Nation and are not entitled to be enrolled for such purposes.

Fourth: That those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation, either prior or subsequent to November 1, 1875, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of lands or in the distribution of the funds of the Cherokee Nation, or people, and are not entitled to be enrolled for such purposes.

Fifth: In not holding that the Commission to the Five Civilized Tribes were compelled to enroll all intermaried citizens of the Cherokee Nation now living and whose names are found on the rolls of 1880, together with all such other intermaried white persons as may be entitled to citizenship under Cherokee laws and that all persons entitled to be enrolled by the Commission to the Five Civilized Tribes as citizens of the Cherokee Nation, including intermarried whites, are entitled under the law to participate in the distribution of the common property of the Cherokee Tribe, now being made by said Commission under the Act of Congress of July 1, 1902. (32 Stats., 716, 720.)

BRIEF OF ARGUMENT.

Who shall be enrolled as Citizens of the Cherokee Nation by the Commission to the Five Civilized Tribes?

The question propounded and submitted by the Honorable Secretary of the Interior is rather unfair and misleading. It was evidently suggested and framed by those opposed to the maintaining of any property rights by the intermarried whites, and more than one half of it is irrelevant to the determination of any issue that can arise under the agreement in controversy. After quoting the law authorizing the making of the tribal rolls by the Commission to the Five Civilized Tribes, giving specific directions as to how they shall be made, and what names shall be put upon them, he says, a protest has been filed, not against the enrollment of the intermaried whites entitled to citizenship under Cherokee laws, but against their enrollment "so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character."

We respectfully submit that when you settle the first part of the proposition, you have *a fortiori* settled the second. Because, *the* question to be determined is whether or not persons claiming rights of citizenship in the Cheroke Nation by intermarriage are entitled to enrollment at all by the Commission to the Five Civilized Tribes under

the sections of law set forth in the letter of the Secretary, and not what will be the effect or logical consequence of such enrollment.

We believe that much light will be thrown upon this matter by referring to the creation, jurisdiction and acts of the Commission to the Five Civillized Tribes. This is done up ta a certain time, in the statement by Chief Justice Fuller in the case of Stevens vs. Cherokee Nation, 174 U. S., 445, but for convenience and to bring these things up to date, we shall set forth briefly the sections of law enacted in regard to the Commission which particularly affect the questions under consideration and their work under them, as well as some Congressional actions during that period.

This Commission was created by the 16th section of the Indian Appropriation Act of March 30, 1893 (27 Stat. 645). In this Act nothing was said about the making of rolls of the five civilized tribes; the power confered was merely to enter into negotiations with either the Five Civilized Tribes, ~~This is done up to a certain time, in the~~ tinguishment of the National or tribal title to any lands within that territory, now held by any and all of such Nations or Tribes, either by cession of the same or of some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such Nations or Tribes respectively as may be entitled to the same."

This Commission was composed originally of three members, but was enlarged by two additional members by the Act of March 2, 1895, (28 Stat. 939). Several years elapsed, and little progress was made, all of the tribes holding out against any allotment, and endeavoring to stand upon their ancient treaties. The Senate, on March 29, 1894, concluded to do some separate work in this behalf, and, by a resolution, instructed a committee to visit the Indian Territory "to inquire into the present condition of the five civilized tribes of Indians and of the *white citizens* dwelling among them."

This committee, after visiting the Indian Territory, made a report, on May 7, 1894, (Sen. Rep. No. 377; 53 Cong., 2nd Sess). A detailed statement of the population of the Territory was made and reference was particularly made to "al arge accession to the population of *whites who make no claim to Indian citizenship*, and who are residing in the Indian Territory with the approval of the Indian authorities." Again, after showing that conditions had changed materially on this account in the Territory, and that the whole policy of the Indians and the Gov-

ernment had been changed, that is, that of isolation and exclusiveness, the report says:

"It is not the fault of the Government of the United States, but comes from their own acts in admitting *whites to citizenship under their laws*, and by inviting white people to come within their jurisdiction to become traders, farmers and to follow professional pursuits."

The Committee also refers especially to a class of white people called intruders which obtained most extensively in the Cherokee Nation. This reference is very pertinent to the determination of this question because that was a class of people not in the Cherokee Nation by its permission, but were there claiming rights of citizenship. They had besieged Congress for years representing that they were unlawfully deprived of citizenship in the Nation and that they could not get a fair hearing before the tribunals of the Cherokee Nation, and that the only way that they could get a fair hearing and their cases finally and fairly settled was by the creation of a citizenship tribunal by Congress. By this time, too, it was seen that, in order to make a fair allotment of the lands and to have fair rolls, the final rolls of the several tribes would have to be made under the supervision of the United States authorities. So, in order to accomplish the double purpose of making a fair and full roll and of silencing forever the clamor of these claimants to citizenship, particularly in the Cherokee Nation, Congress, in the Indian Appropriation Act of June 10, 1896, (29 Stat. 321), provided that "Said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and, after such hearing, they shall determine the right of said applicant to be so admitted and *enrolled*.". Not we see to be enrolled "so as to recognize their right to participate in the common property of the Cherokee Nation," but simply to determine whether they were legally citizens and therefore to be enrolled.

The Commission were instructed to respect all the laws of the several nations or tribes, and to give due force to the rules, usages and customs of each of said nations or tribes. It was also provided that "the rolls of citizenship of the several tribes, as now existing, are hereby confirmed." Six month were allowed for the hearing of the various applications, and, after that time the Commission was to cause a complete roll of citizenship of each of said nations to be made from all their records, subject to appeals in cases denied, to the United

States Court in the Indian Territory.

It was a notorious fact, however, that one particular roll of certain citizens of the Cherokee Nation was fraudulent and unfair; that the nation had refused to authenticate one or more of its own rolls, and that the last roll it had authenticated was the roll of 1880. Therefore by the subsequent act of June 7, 1897, (30 Stat. 62), Congress provided that the words, "rolls of citizenship," as used in the Act of June 10, 1896, "shall be construed to mean the last authenticated roll of each tribe, which have been approved by the council of the nation."

The Commission to the Five Civilized Tribes had still made little progress in getting any of the Nations to make an agreement for the division in severalty of their lands. Much of their time had been taken up in hearing of contested citizenship cases and preparing the final rolls of the several tribes; so Congress, by the Act of June 28, 1898 (30 Stat. 495), an Act generally known as the Curtis Bill, took the matter into its own hands and arbitrarily devised an elaborate scheme for changing the condition of things in the Indian Territory, completing the rolls of citizens of the several nations, and alloting the lands and distributing the funds among enrolled citizens. By Section 11 of said Act it was provided that when the rolls of citizenship of any tribe were completed, as provided in the Act and the survey of the lands completed in the Nation, the roll of which had been completed, the Commission, which is there denominated, and is subsequently better known as the "Dawes Commission," "shall proceed to allot the exclusive *use* and *occupancy* of the surface of all of the lands of said nation or tribe susceptible of allotment among the *citizens thereof, as shown by said roll.*". It will be seen ,therefore, that even in the first law touching the allotment of lands enacted without the consent or co-operation of any Indian tribe, the land was to be allotted among *the citizens* of the nation and that the roll made by the Dawes Commission should determine *what citizens* were entitled to allotment; in other words, that every citizen shown on the roll made by the Commission in accordance with the provisions of the Curtis Bill had to receive an allotment. Section 21 gives full and explicit directions as to how the Commission shall make the rolls and particularly what roll of the Cherokee Nation was intended to be confirmed by it and previous Acts of Congress. The directions contained in section 21, so far as this case is concerned, are as follows:

"Section 21. That in making rolls of citizenship of the several

tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take *the roll of Cherokee citizens of eighteen hundred and eighty* (not including freedmen), as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll *all persons now living* whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to make correct rolls of the *citizens by blood* of all the *other* tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship* under the treaties and the laws of said tribe."

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants there after born to them, *with such persons as may intermarry according to tribal laws,* shall alone constitute the several tribes which they represent."

Two things decisive of this case are shown in the above sections. First, that citizenship alone constituted the right which entitled one to share in the property of the several nations; second, that in the Cherokee Nation, just as in the Choctaw and Chickasaw Nations, a part of that citizenship was "such intermarried white persons as may be entitled to citizenship under the Cherokee laws", and particularly all whose names were on the 1880 roll and then living.

The records of this Court and of Congress show that it had not been long since the native Cherokees had a very erroneous idea as to the distribution of the common property of the nation, and it took several decisions of the Court of Claims as well as this Court, to settle the proposition that there was no such thing as property rights in the lands and funds of the nation apart from citizenship, and that other citizens besides native born Cherokees were entitled to property rights.

In *Cherokee Nation vs. Journeycake,* 155 *U. S.,* 196, Justice Brewer uses this language:

But it must be borne in mind that the rights and interests which the native Cherokees had in the reservation and outlet sprang solely from *the citizenship* in the Cherokee Nation, and the grant of equal rights as members of the Cherokee Nation naturally carry with it a grant of all rights springing from citizenship."

Again, Chief Justice Fuller, in *U. S. vs. Old Settlers,* 148, *U. S.,* 427, said:

In *Stephens vs. Cherokee Nation,* 174 U. S. 488, he again said:

"The lands west of the Mississippi were held as communal property not vested in the Cherokees as individuals, as tenants in common or joint tenants."

The reason for the explicit addition of the intermarried white citizens will appear when we come to the consideration of the provisions for making a roll of the citizens of the nation when Congress enacted a law on that subject which received the sanction of the nation. This was done by an Act of July 1st, 1902 (32 Stat., 716). In this act the various terms used in it involving citizenship were defined. Section seven says:

"Section 7. The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to mean members or citizens of the Cherokee Nation, in the Indian Territory"—not restricted to citizens having property rights, but embracing all citizens.

Adopting the terminology of the Curtis Act, Section 11 provided that:

"There shall be *allotted* by the Commission to the Five Civilized Tribes and to *each citizen* of the Cherokee Tribe, as soon as practicable after the approval of the Secretary of the Interior, of *his enrollment,* as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation."

It is clear then that the Commission are compelled to allot land to each citizen of the tribe who is on the roll, as provided by the Act. The provisions of the Act touching enrollment are sections 25 to 27, inclusive:

"Sec. 25. The *roll of citizens* of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

Sec. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled, as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen. and *no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.*

Sec. 27. Such roll shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight. (Thirteenth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred. (Thirty-first Statutes, page two hundred and twenty-one)."

It will be seen that in making this roll, no white person who had intermarried with a Cherokee citizen after the 16th day of December, 1895, should be entitled to enrollemnt, or to participate in the distribution of the tribal property of the Nation. If they meant what the court of claims decided they certainly could have said none who married subsequent to November first, 1875. This was a distinct recognition of the Act of the Cherokee Council approved on the 16th day of December, 1895, and found on page 12 of the printed record, and is as follows:

"An Act in Regard to Marriage of White Men and Foreigners."

"Be it enacted by the National Council: That from and after the passage of this Act, all non-citizens who shall marry Cherokees by blood, Delawares or Shawnees by blood, citizens of the Cherokee Nation, shall acquire by such marriage no rights of property, lands or money belonging in common to the Cherokee people, or the Cherokee Nation, and Chapter XII, Article XVI, Sections 659 to 669, inclusive, pages 329 to 334 of the Compiled laws of the Cherokee

Nation, is hereby so amended as to conform to the provisions of this Act, and to vest no other than political rights in persons not of Cherokee, Delaware or Shawnee blood, who marry Cherokees by blood, or Delawares or Shawnees by blood, who are recognized citizens, and all laws or parts of laws, conflicting herewith are hereby repealed."

"Passed the Council December 5th, 1895.

JOHN W. SHARP,
Speaker of Council.

JOHN R. LEACH,
Clerk of Council.

Passed the Senate December 6th, 1895.

SAMUEL SMITH,
President of Senate.

BROWN HITCHCOCK,
Clerk of Senate.

Approved December 16th, 1895.

S. M. HAYES,
Principal Chief, C. N."

The history of the enactment of this law is both relavant and interesting. The Cherokee Nation had previously contended that none of its citizens, except native born Cherokees by blood, were entitled to share in the lands and property of the Nation. It had contended as before shown that neither the Shawnees, Delawares or freedmen citizens of the Nation were so entitled, and all three classes of such citizens had to bring suits in the Court of Claims, and some of them had to prosecute them as far as this Court to secure their just and plain rights.

Cherokee Nation vs. Journeycake, 155 *U. S.* 196.

In the case involving the right of Cherokee freedmen to the public lands and monies of the Nation, *Whitmire vs. Cherokee Nation*, 30 *Court of Claims*, 187, the Court says:

"The same clause of the Cherokee Constitution which recognizes 'all Indians' and freedmen, and declares them to be citizens of the Cherokee Nation, and classes them with 'native born Cherokees,' also recognizes and classifies *'whites legally members of the Nation by adoption.'*"

The Court then shows that there were at that time over two

thousand adopted whites, and that their rights should be protected by its decree. It further says:

"The only evidence before the Court in any of these three cases setting forth the whole number of the Cherokee Nation enumerates its adopted whites, Creeks and Choctaws, as citizens and as parts of the whole number."

Continuing ,says: "The Court does not intend to express an opinion concerning the constitution and rights of these adopted citizens in the common property of the Cherokee Nation." Yet it decides that their interests, so far as the evidence before the Court is concerned must be protected.

That decision was rendered on the 18th day of March, 1895. The National Cherokee Council could not convene until the November following. One of its first acts was to pass the bill above referred to, and to cut off thereafter any rights of intermarried whites in the lands and funds of the Nation. It will be seen from the foregoing section of the treaty that there is definitely fixed a time which ended the acquiring of property rights by white persons intermarrying with Cherokee citizens by blood.

This section plainly and unmistakably shows that there was a class of persons who having married prior to that time were to be enrolled, embracing all lawfully married according to the laws of the Nation, and were to participate in the distribution of the tribal property of the Cherokee Nation; that follows necessarily from the language of section 27, because, after denominating what class of intermarried citizens should not be enrolled, there follows: "Such rolls shall in all other respects be made in strict compliance with the provisions" of the Curtis Act. Let us therefore recur to the provisions of the Curtis Act, as found in section 21 of that Act. As stated previously, that Act confirms "the roll of *Cherokee citizens* of 1880 (not including freedmen)" and then the Commission to the Five Civilized Tribes is directed "to enroll *all* persons now living whose names are found on said roll," except freedmen.

It will not be disputed that hundreds of names of persons—men and women—claiming citizenship by intermarriage in the Cherokee Nation and now living are found on said roll, and that they are enrolled on said roll as set forth on page 60 of the record. The Act of the Cherokee National Council authorizing the roll of 1880 was

passed December 3, 1879, is found on page 58 of the record and is as follows:

"AN ACT for taking the census of the Cherokee Nation for the year 1880.

Section 1. Be it enacted by the National Council, that two expert and responsible persons, one of whom talks (speaks) the Cherokee language, to be appointed by the Principal Chief (in each district), and who shall be resident of the district from which they are appointed, be and they are hereby directed and authorized to take the census of their respective districts between the first day of March and the first day of May, 1880, and make full and certified returns thereof to the Principal Chief on or before the first day of June of said year. That said census takers before entering upon the duty hereby assigned to them shall take an oath for the full, impartial, and correct performance of the same, as hereinbefore defined.

Section 2. That it shall be the duty of said census takers to take a full and complete return of all persons found residing or sojourning within the limits of the respective districts at the time of making the enumeration, as required by the foregoing section. And said returns shall show the names of all heads of families, giving a complete registration of births, deaths and marriages; also the age and sex; the names of all males above the age of eighteen years; the names of all females above the age of eighteen years; the names of all males under the age of eighteen years; the names of all females under the age of eighteen years; the names, sex and ages of all orphans under sixteen years; *the names of all whites entitled by law to citizenship within the ages specified;* the names of all whites not so entitled; the names of all colored persons entitled by law to citizenship, within said ages and names of all such persons not so entitled, and the names of all Indians not so entitled; also a report of the chief production of agriculture, including the number of horses, cattle, hogs, sheep, etc., during the year ending May first, 1880.

Section 3. That it shall be the duty of the Principal Chief to cause ruled blanks to be prepared of a suitable and convenient form and furnish to said census takers, for the purpose of making the enumeration herein provided for, and said census takers shall be allowed three dollars a day in the performance of the duties hereinbefore imposed upon them.

Section 4. That it shall be the duty of the Principal Chief to cause a summary of the returns of said census to be prepared, and laid before the national council, together with the full returns of the same, at the beginning of the annual session thereof in 1880. *And said returns shall serve as a basis for the representation* of the several districts of the Cherokee Nation in the National Council, in accordance with the amendment to the constitution dated November 21, 1886.

Section 5. BE IT FURTHER ENACTED: That all persons whose rights to citizenship in the Cherokee Nation shall be called in question, and shall be reported by the persons authorized by this Act to take the census of the Cherokee people, on the list of doubtful persons, shall be required by the Principal Chief to appear before the Commission on citizenship at Tahlequah during the month of September, 1880, for the adjudication of their claims to Cherokee citizenship.

Section 6. Be it further enacted: That the sum of two thousand, four hundred and sixty dollars ($2,460.00) be and the same is hereby appropriated out of the money in the general fund not otherwise appropriated to defray the expenses of census takers and for necessary stationery, and the Principal Chief is hereby authorized to draw preferred warrants for the same."

By section 2 it was the duty of the census takers to show by their returns "the names of all whites entitled *by law to citizenship* within the ages specified; the names of all whites *not* so entitled, etc."

Now, it is contended by our opponents that it would be absurd to say that the Commission should enroll everybody on the 1880 census roll because the census takers were authorized to make returns showing every resident of the Nation, whether citizen or non-citizen; but we must remember that the language of the Act of Congress is that the only roll confirmed was "the roll of *Cherokee citizens* of 1880." This becomes perfectly clear when we refer to the Act of the Cherokee Council confirming "the roll of Cherokee *citizens*" because that is the only roll or schedule confirmed by the Act of the National Council. That Act is found on page 53 of the record, and was passed on December 9, 1880, and is as follows:

AN ACT authorizing the Census Returns of 1880, and providing for a copy thereof.

"Section 1. Be is Enacted by the National Council, That the register or *schedule of citizens of the Creek Nation* submitted to the Principal Chief by the census takers of the year 1880, under requirement of the Act providing for taking the census of the Cherokee Nation. as the said register or schedule has been examined, revised and amended by the committee of the present national council, duly appointed for the purpose, and by them submitted to and accepted by the council, is hereby approved as a true and correct *list of persons* acknowledged and recognized *to be citizens of the Cherokee Nation* at and within the time the said census was authorized to be taken.

Section 2. Be it Further Enacted, That there shall be made in fair and legible handwriting, and under the supervision of the Principal Chief, a neat and complete alphabetical transcript or copy of all names of *citizens* and *non-citizens* to be found in the census returns revised and amended as before mentioned, with such descriptive matters and things as are attached to each name. The work of making such copy shall be done by two clerks of the executive department, duly appointed and instructed by the Principal Chief to perform the same; and who shall receive as compensation therefor, when the said work shall have been finished, approved and filed as provided by said Act, the sum of ($250.00) two hundred and fifty dollars each for warrants which amounts the Principal Chief is authorized to draw "preferred" warrants upon the general fund.

The said transcript or copy shall be made upon blank forms of the like kind furnished the census takers to take the census of 1880.

Section 3. Be it Further Enacted. That when the said copy shall be made and completed as hereinbefore provided, the 'returns' of each district as copied, shall be by the said clerks submitted to the Principal Chief duly certified to by them as to pages, number of names *in each schedule*, and that the copy has been made correctly according to the provisions of this Act. When so certified, and upon the examination of the Principal Chief approved by him, he shall be authorized to indorse the copy of the returns of each district as so approved, and place the same on file in the executive office for safe-keeping, and general reference under his care and direction.

Section 4. Be it Further Enacted, That any person, citizen of this Nation at the time of taking the census of 1880 (March and April), who shall have been inadvertantly omitted to be so registered by the

census takers or the committee appointed to revise the census, and whose name does not appear enrolled or recorded otherwise, and who shall desire *to be enrolled as a citizen* shall be required to make satisfactory showing to the Principal Chief, by methods and evidence which he may consider sufficient in each case, that such person was a citizen of the nation when the census was being taken and of what district, and the Principal Chief is requested to report the names of all persons who shall apply under this section with the material facts ascertained by him in each case to the National Council of 1881 for their information and action.

Section 5. Be it Further Enacted, That all persons whose names have been reported by the census takers in *schedule* 1 *as citizens,* and whom the revising committees of this Council have marked and signified as not entitled to be returned, shall be summoned by the Principal Chief to appear before the commission of citizenship at their next September session (1881) for the adjudication of their claims according to the provisions of law relating to doubtful citizens and the names of all persons who have appeared shall appear before said Commission as 'doubtful citizens,' either by authority of the Acts of December 3, 1879, and authorizing the taking of the census (not including 'new claimants' enrolled in *schedule* 4) or by authority of this Act in whose favor the said Commission have decided or shall decide, shall be by the executive secretary attached to the official copy of citizens hereinbefore authorized to be made and filed in the executive office.

(Tahlequah, Cherokee Nation), December 6, 1880.

S. H. BENGE,

President Senate.

J. L. SPRINGSTON,

Clerk of Senate."

It will be seen that the various classes of persons were put in *separate schedules.* Section five shows that the citizens were put on schedule 1; that new claimants were put on schedule 4, and that section 1 which confirms the citizenship roll says:

"The register or schedule *of citizens* of the Cherokee Nation submitted to the principal chief by the census takers of the year 1880.....is hereby aproved as a true and correct list of persons acknowledged and recognized to be *citizens of the Cherokee*

Nation at and within the time the said census was authorized to be taken."

The names found on page sixty of the record were taken from that schedule, a schedule printed and used by the Cherokee Nation as showing its citizens since that time and continuously used by the Commission to the Five Civilized Tribes in making the rolls of the Cherokee Nation; and the Court finds as a fact that the names there mentioned appear on the census roll *referred to* by Congress, a roll which Congress says specifically is confirmed and that the name of every person on it living September 1st, 1902, shall be put on the *roll of citizens* of the Cherokee Nation, authorized to be made by the Dawes Commission.

But what of those citizens who married since the roll of 1880 was made? After mentioning the enrollment of the persons on the 1880 roll, there are further powers and directions as follows: "enrolling only such as may have lawful right thereto and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*"

Evidently the matter was couched in language familiar to the Cherokees, language well understood by them. That language may be found in various portions of their laws touching citizenship. The first intermarriage act of the Cherokee Nation was passed on November 2, 1819, compiled in the laws of the Cherokee Nation of 1852, page 10, and is as follows:

"New Town, Cherokee Nation, November 2, 1819.

RESOLVED by the National Committee and Councils That any white man who shall hereafter take a Cherokee woman to wife be required to marry her legally by a minister of the gospel or other authorized person, after procuring a license from the national clerk for that purpose, before he shall be entitled and admitted to the *privilege of citizenship;* and in order to avoid imposition on the part of any white man,

RESOLVED: That any white man who shall marry a Cherokee woman, the property of the woman so married, shall not be subject to the disposal of her husband, contrary to her consent; and any white man so married and parting from his wife without just provocation shall forfeit and pay to his wife such sum or sums as may be adjudged to her by the national committee and council for said breach of marriage, and *be deprived of citizenship;* and it is also re-

solved that it shall not be lawful for any white man to have more than one wife, and it is also recommended that all others should also have but one wife hereafter.

By order of the National Committee.

JOHN ROSS,
President National Committee.

Approved: PATH KILLER,
CHAS. R. HICKS,
A. McCOY, Clerk."

The next and most comprehensive law was passed October 15, 1855 (Record page 50), and is as follows:

"AN ACT REGULATING INTERMARRIAGE WITH WHITE MEN.

Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws*jurisdiction should be exercized over all persons whatever,* who may from time to time be privileged to reside within the territorial limits of this nation: Therefore,

BE It Enacted By the National Council, That any 'unmarried' white man desiring to marry a Cherokee woman shall be, and is hereby required to obtain a license for the same from any of the Clerks of the district courts of the several districts.

BE It Further Enacted, That before any license as provided above shall be issued, the person applying shall be and is hereby, required to pay to the clerk to whom application is made the sum of five dollars, and also required to take the following oaths:

'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States Government or its judicial tribunals any protection, privileges, or redress, incompatible with the same as guaranteed to the Cherokee Nation by the United States, in treaty stipulations entered into between them.'

BE It Further Enacted, That all white men applying for license, as provided in the first section of this Act, shall, before obtaining the same, be required to present to the said Clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

BE It Further Enacted, That all judges of this nation, and every regular minister of all evangelical denominations. having the care of souls, are hereby authorized and empowered to solemnize the

rites of matrimony, according to the ceremonies usually observed and performed in such cases, under the provisions of this act.

BE It Further Enacted, That no marriage between a citizen of the United States and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided shall be legal; and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before any district Court of this nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be entitled for his services to twenty per cent of the amount collected, and who shall place the remainder in the hands of the national treasurer for public benefit.

BE It Further Enacted, That persons performing the marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to the back of the license which shall be returned. The holder of the license and certificate shall then place the same in the hands of the Clerk of the District Court, whose duty it shall be to record the same in his office.

BE It Further Enacted, That any white citizen of the Cherokee Nation by marriage, etc., who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, *shall forfeit his right of citizenship to the same,* and be subject to be dealt with as other white intruders in the country, and shall be removed out of this nation.

BE It Further Enacted, That should any white man or woman become a *citizen of the Cherokee Nation by marriage,* and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widower or widow shall continue to enjoy Cherokee privileges, unless such white widower or widow shall marry a white man or woman (as the case may be); then, in that case, all of his or her *right to Cherokee citizenship shall cease.*

BE It Further Enacted, That any white man who shall *lawfully marry under the provisions of this Act,* and then or afterwards abandon his wife, shall not be entitled to any of *the rights and privileges of a citizen of the Cherokee Nation,* but shall be and is hereby considered, and shall be removed as an intruder."

The laws of the Cherokee Nation were compiled subsequently

by an act of the Cherokee Council, and the last provision of said act appeared in the new code as section seventy-five, being put there by the revisers who were authorized to amend laws and enact new ones subject to the approval of the National Council. The language of the last section was somewhat changed and reads in the new code of 1875 as follows:

"Sec. 75. Every person who shall lawfully marry under the provisions of this act, and afterwards abandon his wife, shall thereby forfeit every right and privilege of citizenship of this Nation, and shall be considered and removed from the Nation as an intruder; provided, that every adopted citizen under the provisions of this act, shall have been a *bona fide* resident of the Nation for six months previous to his admission to the polls as a legal voter; and every such adopted citizen who shall be guilty of denying or resisting the jurisdiction of this Nation, or shall appeal to or claim that of any other government shall be adjudged guilty of perjury, and be liable to all the pains and penalties prescribed in such cases; provided, also, that the rights and privileges herein conferred, shall not extend to right of soil or interest in the vested funds of this Nation, unless such adopted citizen shall pay into the general fund of the National Treasury a sum of money to be ascertained and fixed by the National Council equal to the *pro rata* share of each native Cherokee, in the lands and vested wealth of the Nation, estimated at five hundred dollars, and thereafter conform to the constitution of the Nation, and to the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to the rights of all other Cherokees."

The Cherokee Council again, by an Act approved November 28, 1877, amended said section 75 by striking out all of said section after the words, "this nation," where such words occur in the third line of the second provision.

On November 19, 1880, the National Council passed an Act authoriznig another compilation of the laws of the Nation, and provided that the chief should appoint two competent persons to compile the laws then in force. The Act also authorizes them to "omit all acts that have been repealed, or have become inoperative by ceasing to be applicable to existing affairs, and to prepare an index to the same." In compiling the laws touching intermarriage, section seventy-five above referred to, and found in the New Code of 1875, and amended

by the act of November 28, 1877, went into the 1880 compilation as section 667, in the following language:

"Every person who shall lawfully marry under the provisions of this Act and afterwards abandon his wife shall thereby forfeit ever right and privilege of citizenship of this nation."

That section as thus set forth and the other sections as compiled in the edition of 1880 were similarly compiled in the edition of 1892, page 329, article 16, section 659 to section 669, inclusive, and are as follows:

INTERMARRIAGE OF WHITE MEN AND FOREIGNERS.

"Section 650. Whereas, the peace and prosperity of the Cherokee people require that, in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this nation, therefore, every white man, or citizen of the United States, or of any foreign state or government, desiring to marry a Cherokee, 'Deleware, or Shawnee' woman, citizen of the Nation, shall be and is hereby required to obtain a license for the same from any of the district clerks of the several districts, and make oath or satisfactory showing to such clerk, that he has not a surviving wife from whom he has not been lawfully divorced. And, unless such information be freely furnished to the satisfaction of the clerk, no license shall issue.

"Section 660. Every white man or person applying for license, as provided in the preceding section of this act, shall, before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least ten (10) respectable citizens of the Cherokee Nation who are Cherokees, Delewares, or Shawnees by blood, and who shall have been acquainted with him at least six months immediately preceding the signing of such certificate, together with a certificate of good moral character, signed by the county clerk and sealed with the seal of the county of which he was a voter.

"Sec. 661. Before any license as herein provided shall be issued, the person aplying shall be, and is hereby required to pay to the clerk to whom application is made, the sum of five dollars, for the benefit of said clerk, and the additional sum of five dollars for the benefit of the Cherokee Nation; and all sums, so received for the benefit of the Nation, shall be turned over to the Clerk of the national treasurer, on the first Monday in November of each year, beginning

with 1881, and be also required to take the following oath:

"'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States or any other government, or from the judicial tribunals thereof, any protection, privilege or redress incompatible with the same, as guaranteed to the Cherokee Nation by the United States in treaty stipulations entered into between them. So help me God.'

"Sec. 662. Marriage contracted under the provisions of this act shall be solemnized as provided by the laws of this Nation, or otherwise shall be null and void.

"Sec. 663. No marriage between a citizen of the United States or of any foreign nation and a female citizen of this Nation, entered into within the limits of this Nation, except as hereinbefore authorized and provided, shall be legal; and every person who shall engage or assist in solemnizing any such marriage, shall, upon conviction before any district court of this nation, be fined one hundred dollars; and it shall be the duty of the solicitor of the district in which such person may reside, to collect the same; and such solicitor so collecting, shall be entitled, for his services, to twenty-five per cent. of the amount collected; and shall place the remainder into the hands of the treasurer to be by him credited to the general fund.

"Sec. 664. Every person performing the marriage ceremony under the authority of a license provided for herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in whose behalf it was issued, who shall, within thirty days therefrom, place the same in the hands of the district clerk, whose duty it shall be to record the same, and return it to the owner.

"Sec. 665. Every *adopted citizen of the Cherokee Nation, by marriage* or otherwise, who shall use the intercourse law or laws, (as they are termed), in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, *shall forfeit his rights of citizenship* to the same, and be subject to be dealt with as other intruders in the country, and shall be removed out of this Nation.

Sec. 666. Should any man or woman, a citizen of the United States or of any foreign country,*become a citizen of the Cherokee Nation by intermarriage,* and be left a widow or widower by the de-

ceased of the Cherokee wife or husband, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry a white man or woman, or person, (as the case may be), having no rights of Cherokee citizenship by blood; in that case, all of his or her rights acquired under the provisions of this act shall cease..

"Sec. 667. Every person who shall lawfully marry under the provisions of this act, and afterwards abandon his wife, shall thereby forfeit every right and *privilege of citizenship* of this Nation.

"Sec. 668. Property of every description, possessed within the limits of the Cherokee Nation by an adopted citizen shall, in case such adopted citizen abandon his wife without lawful cause, be the absolute property of such wife, or wife and children. But whenever such abandonment shall be planned or effected by the wife for the purpose of ridding herself of her husband, then in that case such wife shall be entitled to only such property as shall be awarded—upon application of either party for divorce, by the court having jurisdiction.

Sec. 669. The Circuit Court shall have authority to hear and determine all cases that may be brought before it by any person or by the solicitor of the district wherein it may be alleged that a citizen of the United States or of any other Government, adopted by intermarriage under the laws of the Cherokee Nation, has forfeited his rights to citizenship in said Nation by acts which declare such forfeiture. Proceedings in such cases shall be by citation if the party be resident in the Cherokee Nation, or by thirty days notice of such procedings in the Cherokee Advocate, and be conducted as well as are civil suits before such courts. On the finding of the verdict by the jury against such person, it shall be the duty of the clerk of the court to notify the principal chief of such findings, and it shall be the duty of the Principal Chief to make known such finding to, and call up the United States Indian Agent for the removal of such person beyond the limits of the Cherokee Nation. It shall not be lawful thereafter for any clerk to issue a marriage license, or permit to reside in the Cherokee Nation, in any capacity whatever, to any person so declared to have forfeited his rights to citizenship in the Cherokee Nation. (December 6, 1890.)" This last date refers only to the Amendment embraced in the last section.

All citizens who married under the law as contained in these two compilations were "entitled to citizenship under Cherokee law" for

that was the law until the enactment of the act above mentioned, on the 16th day of December, 1895, after which time the agreement says that no intermarried citizens shall be enrolled. But our opponents contend that the law as contained in the New Code of 1875 has never been repealed, except as to the payment of the $500, and it therefore prevents the participation of intermarried citizens in the distribution of the lands and money of the Nation. Let us, for the sake of the argument, admit that it has never been repealed, except in that respect. It cannot be maintained and will not be contended, we presume, by the counsel on the other side, that the persons who have intermarried under the laws of the Cherokee Nation since that time, and as set forth in laws of 1880 and 1892, are not citizens of the Nation. Section 663 of act set out above says how a white man may be lawfully married under the laws of the Cherokee Nation. The Act of Congress makes no distinction between political citizens and citizens possessing rights of property. It only says that the Commission shall enroll every person who is a citizen under the Nation's laws. It must certainly be admitted that the names of all intermarried citizens on the roll of 1880 must be put on the roll no matter what law they were married under, and many of them married after the 1st of November, 1875. Those who married after 1877 were married under the same law as those who married subsequent to 1880. It is fair to suppose that if Congress directed every person to be enrolled who was on the 1880 roll and was married after the Act of November 27th, 1877, that it certainly intended to accord the same right to a man who married under the same law, but who married subsequent to the roll of 1880 and therefore could not get on it. But let us see how the language of the Act of Congress conforms to the language of the law of the Cherokee Nation which were not repealed, for the repealing clause touched nothing affecting the legal requirements of the marriage laws.

The law of 1819 prescribed what a white man was required to do in taking a Cherokee woman to wife, "before he shall be entitled and admitted to the privilege of citizenship." An elaborate ceremonial is provided for in the act of 1855 for the marriage of white men and Cherokee women, and, after the performance of such ceremony, and complying with the provisions of the Act, the white person is made a citizen. In the last three paragraphs, we find the following expressions, "That any white citizen of the Cherokee Nation by marriage,

etc." "That should any white man or *Woman* become a citizen of the Cherokee Nation by marriage," "That any white man who shall lawfully marry under the provisions of this act, and then, or afterwards abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation." The converse of this last proposition must of course be true, that so long as he remained faithful to his wife, and did not abandon her, after having married her in compliance with the requirements of the laws of the Cherokee Nation, he should continue to exercise and be entitled to all "of the rights and privileges of a citizen of the Cherokee Nation."

It would be an absurdity to provide that one could lose or forfeit by any act a right which he had never acquired or possessed. We see that in sections 73 and 74 of the Act found in the New Code of 1875, there are used the terms, "adopted citizens of the Cherokee Nation by marriage or otherwise," and "A citizen of the Cherokee Nation by intermarriage." The expression used in section 73 of compiled laws of 1875 made a change in the law of 1855,—the expression "adopted citizen" being substituted for the term, "white citizen," used in the original Act. These sections, 73 and 74, as compiled in the edition of 1875, remain the law of the Cherokee Nation today, and are carried in the last edition of these laws, as sections 665 and 666, supra, and compliance with them at any time up to December 16, 1895, constituted "such intermarried white persons as may be entitled to citizenship under Cherokee laws."

The compiled laws of the Cherokee Nation of 1880 and those of 1892 were, during their existence, and are now, received as the laws of the Cherokee Nation; they are certainly *prima facie* evidence of the laws.

The Barrowdale, 39 *Fed.* 376.

The Act of 1895 above referred to recognized the law in force as found in the edition of 1892, and if it did not, it served to revive the law of 1855, as found on those editions, and to eliminate the repealing act of 1877.

United States vs. North Amer. Com. Co., 74 *Fed. Rep.* 145.

Kirkpatrick vs. Commonwealth, 25 *S. W. Rep.* 113. . . .

Taylor vs. Chickasaw Company, 19 *So. Rep.* 834.

The Cherokee Council, or legislature as it was, in the Act of 1895 took what was notoriously held out to be, and acted on as, the law and amended it. It had been so held out with the assent of the

authorities and the common consent of all the people as the law, and it would constitute, as a custom of the nation, the repeal of all inconsistent and conflicting laws.

Adams vs. Norris, 64 *U. S.* 353.

Pearson vs. International Distillery, 34 *N. W.* 1.

Keyport Company vs. Farmer's Transportation Co., 18 *N. J. Eqt.* 13.

The Act of the National Council of December 11, 1880, placed white persons marrying with Delewares and Shawnees by blood on the same footing as those marrying Cherokees, as Delewares and Shawnees had all the rights and privileges of native-born Cherokees, and they were required to pay $5.00 annually, to be paid to the Clerk and thereby amended the marriage law found in the New Code of 1875. See also Section 659 *Supra,* of 1892 edition of Cherokee Laws.

The Courts of the Indian Territory were established by an Act of Congress of March 1, 1889 (25 Stat. 783). But one court was established at that time, and its jurisdiction was limited to controversies arising between persons of *Indian blood only.* This was a distinct infringement upon the rights of the adopted citizens of the Five Civilized Tribes. So, by the Act of May 2, 1890, (26 Stat. 81). the jurisdiction of the Court was enlarged to embrace almost all controversies, "except cases over which the tribal courts have exclusive jurisdiction." This jurisdiction was then specifically defined further on in the Act in the following language:

"That the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nation by nativity or *by adoption* shall be the only parties."

After this Act was passed and all controversies to which an intermarried citizen was a party was always tried by the tribal courts, and the United States Courts in the Indian Territory at no time assumed such jurisdiction until the Act of June 28, 1898, called the Curtis Bill. *Raymond vs. Raymond,* 83 *Fed. Rep.* 721.

This Court had occasion once to determine that question, and let us see by what laws it was done.

Nofire vs. U. S. 164 *U. S.* 657.

The sole question to be determined was whether Rutherford, a white man charged with killing a full blood Cherokee, had been adopted into the Cherokee Nation as a citizen by intermarriage. In other

words, the Court had to determine the same question which the Dawes Commission has to determine, whether or not Rutherford was *such Cherokee Nation under its laws.* The Cherokee Nation was claiming *an intermarried white person as was entitled to citizenship in the* jurisdiction of the case and the United States Court, at Fort Smith, was claiming it; how, then, did this court determine whether or not Rutherford was an intermarried or adopted citizen under the laws of the Cherokee Nation? First it took up article 3 of the Cherokee Constitution, which is as follows:

"All native-born Cherokees, all Indians and whites legally members of the Nation by adoption . . . . . and their descendants who reside within the limits of the Cherokee Nation shall be taken and be deemed to be citizens of the Cherokee Nation."

Next it referred to the Cherokee Statutes to determine the other question which the Dawes Commission have to determine; that is, who were legally married under the Cherokee laws and thereby had conferred on them all the rights and privileges of Cherokee citizenship. Says the Court:

"The Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are *adopted citizens.*"

The laws quoted to determine this question are sections 659 to 667 inclusive of the compiled laws of the Cherokee Nation, Edition of 1892, page 329, fully set forth *Supra.*

License was issued to Rutherford to marry on August 28, 1894, by the deputy clerk. The Court says, upon Rutherford's trying to comply with those laws, that it was evident that he was trying to change "his nationality" and "become *a Cherokee citizen;* he took the steps which the statute prescribes, and did, as he states, all that was required therefore"

Having, as the Court said, complied with the laws of intermarriage found in the compiled laws of the Cherokee Nation Edition of 1892, "we think it must be adjudged that he was *a citizen by adoption,*"

Thus far, we have not had to consider at all any other question than who are entitled to citizenship under the intermarriage laws of the Cherokee Nation. This Court has said that compliance with the marriage laws as found in the editions of 1880 and 1892 made a white man a citizen of the Cherokee Nation, and there can be no question about that proposition.

It is contended by our opponents that the provisions of the constitution of the Cherokee Nation were not representative; that its constitution merely defined the Nation's citizenship at the time of its adoption. This Court says though that Rutherford who was married in 1894, came within the provisions of that constitution, and that it was continuing in its effect. The act of council authorizing the census of 1880, and which directed the taking of the names of all persons married according to Cherokee laws up to that date, said that the purpose in taking the names of all citizens was that "the returns shall serve as a basis for the representation of the several districts of the Cherokee Nation in the National Council, in accordance with the amendment to the Constitution dated November 21, 1886." See Sec. 4 of said Act*Supra.*

The amendment referred to is that portion of theconstitution defining the citizenship of the Nation and quoted in Nofire case *Supra.*

A similar construction was put upon this same amendment to the constitution and these same Acts of Congress by the Court of Claims, in the case of Whitmire vs. Cherokee Nation, 30 Court of Claims, 149.

That Court even went so far in this case as to discuss the amendment of 1877 to the citizenship law, and other acts of the Cherokee Council, and to say, in conclusion:

"If those lands had remained common property unsold and held for governmental purposes, it seems incontroventible that all classes of citizens, Cherokees by blood, and *Cherokees by adoption* would have been *as citizens* equally and mutually entitled to the national benefits which might be derived from them."

A man who married under those laws from 1880 to December 16, 1895, was amenable to the laws of the Cherokee Nation; he could have been hung under those laws, or sent to the penitentiary (Nofire case, supra); he could have been deprived of his property, or had it protected, by the lawful judgments of the Cherokee Courts.

Raymond vs. Raymond, 83 *Fed. Rep.* 721.

Nivens vs. Nivens, 76 *S. W.* 114 *and* 133 *Fed. Rep.* 40.

In the first case, suit was brought by the wife of Raymond, a white person, who intermarried with him under the laws of the Cherokee Nation, to annul a divorce decree of the tribal Court. Before instituting the suit, she had attempted to become naturalized under an Act of May 2, 1890 (26 Stats., 8199). The United States

Circuit Court of Appeals held that by marrying Raymond she became a citizen of the Cherokee Nation, but that she did not lose her United States citizenship thereby, and that the tribal Court still had jurisdiction over her, until she, by some act, should lose or forfeit her Cherokee citizenship under Cherokee laws. Says the Court:

It is conceded that under the laws of that Nation the appellee became a member of that tribe by adoption through her marriage with the appellant. It is settled by the decisions of the Supreme Court that her adoption into that Nation ousted the Federal Court of jurisdiction over any suit between her and any other member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action."

The Court then proceeded to discuss the effect of a citizen of the United States becoming a member of one of the civilized tribes by adoption, and makes this observation:

"His adoption into one of these tribes has the effect to bestow on him the privileges and immunities if its members, and subjects him to the laws and usages of the tribe, but it has no greater effect. It deprives him of the right to appeal to the Federal Courts for redress for civil injuries he sustains from the members of the tribe of his adoption, but confers upon him the right to have these wrongs redressed in the Courts of his adopted tribe."

The writer brought both of these suits and raised and maintained the questions of Cherokee citizenship decided in them—the same questions involved in this case.

In the second case Bettie Nivens, formerly Bettie Davis, a white woman, had married Jeff Nivens, a native born citizen of the Cherokee Nation. Nivens died while the laws of descent and distribution of the Cherokee Nation were in full force. His white wife then brought suit in the United States Court after the tribal Courts had been abolished for a part of the personal property and for a division of the farm of Moses Nivens, the father of Jeff Nivens, and who had died during the lifetime of Jeff. The decisions may not show that Mrs. Nivens was a white woman and citizen of the United States at the time of the marriage, but the writer was one of her counsel, and knows that to be a fact, and that the record discloses that fact. The United States Court of Appeals, as well as the lower Court, held that she was a citizen of the Cherokee Nation, and inherited from her husband under the laws of the Chero-

kee Nation, and recognizes those laws in the compilation of the laws of the Cherokee Nation of 1892. This case was appealed to the United States Court of Appeals for the 8th Circuit. The case was reversed on the question of personal property and not on the question of Mrs. Niven's Cherokee citizenship or her right to share in allotment of the lands of the Nation; on the contrary, it was admitted that if there was anything to descend, it descended under the laws of the Cherokee Nation, and that if she inherited any land she was entitled to an allotment out of it. As to the allotment, however, Mrs. Nivens had been enrolled under the Cherokee agreement, and her land had been allotted to her prior to the hearing of the case in the upper Court, and that was admitted during the argument to the Court, so that, in deciding the case, Judge Hook says:

"It was admitted on the argument that since the decree in the trial court, the land in controversy has been allotted in severalty by the Dawes Commission, and that by such allotment the appellant, Julia Nivens, received fifty acres thereof and the appellee, Bettie, a like quantity. This disposed of the controversy as to the land, and leaves nothing for consideration but the rents and profits thereon and of the appurtenant ferry."

In the statement of the case Judge Hook says:

"Bettie Nivens is the sole heir of Jeff, and it is his share in his father's estate which she claims."

Under the provisions of section 21 above quoted, the Commission, after being directed as to taking the Cherokee rolls as to all classes, were further directed to make correct rolls of *citizens by blood* of all *the other* five civilized tribes. These and the freedmen were the only rolls to be made of the Creek and Seminoles, as they had no intermarriage laws and no such class of citizens, but to this Choctaw and Chickasaw roll were to be added "such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes."

Acting under said law, the Commission have enrolled thousands of people of the Choctaw and Chickasaw Nations who have married Choctaw and Chickasaw by blood under the laws of said Nations, and they were proceeding to do likewise in the Cherokee Nation, and, in fact, had enrolled about twelve hundred, and had allotted them lands at the time they were stopped by the petition of the full bloods and the letter of the Secretary of the Interior found in this controversy.

The Department had instructed the law as we construe it. It had construed it as everybody must construe it, for it is as plain as the nose on a man's face. These people must be enrolled. When enrolled, we will then determine what is the effect of the enrollment on property rights. In fact, the Secretary states in the first four lines of his letter that the law directs the Commission to enroll them and then submit the question of the effect of such enrollment when allotment is made.

We see above from the Nivens case that immediately after the passage of the Cherokee Agreement, the Dawes Commission proceeded to the enrollment of intermarried citizens and were alloting them land. We shall see below that a large number of them had been placed on the lists which had been approved by the Secretary of the Interior as directed by Section 29 of the Cherokee agreement which constituted them, and Mrs. Nivens in particular, "a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land, and distribution of the tribal property, shall be made," and upon which it had been made by the Commission acting under a plain duty, under a plain direction of the law. The fact of this contemporaneous construction by those charged with the execution of the law is certainly very persuasive, if the Act itself were not very plain.

In re. Board of Street Opening and Improvement, 33 *N. Y. Supt.* 594.

U. S. vs. Tanner, 147 *U. S.* 661.

The Dawes Commission, as we have said, proceeded at once to enroll intermarried Cherokees; see the following from page 26 of their 8th annual report to the Secretary of the Interior, touching Cherokee citizens:

"The total number of cases of applications for enrollment to July 1 has been 12,237, embracing 35,605 persons. Of these there have been listed for enrollment as follows:

"Listed for enrollment on regular cards (*no contest or objection*):

Full-blood Cherokee	2,327
Full-blood Shawnee	185
Mixed-blood Cherokee	19,136
Mixed-blood Shawnee	628
Full-blood Delewares	343
Mixed-blood Delewares	647
Intermarried Cherokees (both sexes)	2,095
Total	25,361"

Also the following from the 9th annual report, page 34:

"The number of applications heard since the enrollment of Cherokee citizens was begun is 14,750, embracing 43,425 applicants. These applicants have been classified as follows:

"ON REGULAR CARDS

Full-blood Cherokees	6,459
Full-blood Shawnees	212
Full-blood Delewares	342
Mixed-blood Cherokees	21,159
Mixed-blood Shawnees	608
Mixed-blood Delewares	694
Intermarried Whites (both sexes)	2,037
Total	31,511"

On page 32 of the same report, after speaking of the opposition of the full bloods in several matters the Commission says:

"Since the last annual report of the Commission, there have been but comparatively few applicants by blood or *intermarriage* against whose enrollment there has been entered a contest."

We find the following on page 21 of the Tenth Annual Report of the Dawes Commission to the Secretary of the Interior:

"The great majority of applications for enrollment as citizens of the Cherokee Nation, both by blood and *intermarriage*, was heard in the summer and fall of 1900. The provision of the Cherokee Agreement that the roll of citizens of the Cherokee Nation be made as of September 1, 1902, therefore, necessitated the taking of additional testimony in every application for enrollment by virtue of intermarriage, in order to determine whether such applicants had, by abandonment of Cherokee wife or husband, or by 'marrying out,' forfeited their rights to enrollment. A letter was accordingly addressed to every person claiming citizenship by intermarriage, notifying him to appear, either at the general office of the Commission at Muskogee or before the special enrolling party stationed at Tahlequah, during the month of October, 1902, and supply such testimony. Supplemental testimony was taken in approximately 2,500 cases, and in numerous instances it was found that applicants of this class had forfeited their rights to enrollment. The recording of so much testimony entailed an immense amount of work, and demanded an unusually large stenographic force. At the same time a part of the

clerical staff was busily engaged in compiling the enrollment records necessary for the establishment of an allotment office in the Cherokee Nation.

"SUMMARIZED STATEMENT OF APPLICATIONS.

"The total number of applicants for Cherokee citizenship, of all classes, received by this Commission since the enrollment of Cherokee citizens was begun on May 11, 1900, is 46,154. This, of course, does not include applications for citizenship made under the provisions of the Act of Congress approved June 10, 1896. (Apendix No. 1, p. 62.)

"The following table shows the number of applicants listed by the Commission, and their classification, on June 30, 1903. The increase in the number of applicants listed upon straight and rejected cards, and the corresponding decrease in the number listed upon doubtful cards, which will be observed by comparing the figures given below those contained in the Commission's last annual report is occasioned by the transfer to straight and rejected cards, of applicants originally listed upon the doubtful cards, but whose cases have now been disposed of.

ON REGULAR CARDS:

Full-blood Cherokees	6,699
Full-blood Shawnee-Cherokees	206
Full-blood Deleware-Cherokees	363
Mixed-blood Cherokees	22,681
Mixed-blood Shawnee-Cherokees	749
Mixed-blood Deleware-Cherokee	733
Intermarried Whites	2,406
Total	33,837

See also the following from page 22 of the same report:

"The number of persons embraced in applications heard up to and including October 31, 1892, including Cherokees, Shawnee-Cherokees and Delaware-Cherokees, by blood and *intermarriage*, and freedmen, is as follows:

On regular Cherokee cards,	32,714
On doubtful Cherokee cards,	2,961
On rejected Cherokee cards,	1,070
On regular Deleware-Cherokee cards,	1,096
On doubtful Deleware-Cherokee cards,	31

On rejected Deleware-Cherokee cards,		3
Memoranda cases (Act of May 31, 1800)		1,328
Total		33,837"
On regular freedmen cards,	3,320	
On doubtful freedmen cards,	3,223	
On rejected freedmen cards,	381	6,924
Grand Total		46,154"

Then follows the introduction of this controversy, which we see is one at first not of enrollment but of right to share in property, for no one tried to argue against the plain letter of the law directing enrollment. The following taken from page 23 of the same report:

"The right of *intermarried white persons* to share in the tribal property of the Cherokee Nation has been bitterly contested by the bull-bloods. The tribe at last succeeded in having the question submitted to the United States Court of Claims for determination, and on March 2, 1903, the Commission was instructed by the Secretary of the Interior to withold from the final roll of Cherokees the names of all persons claiming citizenship by intermarriage. The total number of *intermarried whites* for whom application has been made is 3,549, and until the case now pending before the Court of Claims is finally decided they are classed among the doubtful claimants to enrollment.

THE FINAL ROLL.

Immediately upon the ratification of the Cherokee agreement by the members of that tribe, the Commission addressed itself to the work of preparing, for transmission to the Secretary of the Interior, lists or schedules of persons entitled to enrollment, as provided in section 29 of said agreement, which reads as follows:

"Sec. 29. For the purpose of expediating the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other tribal property shall be made. When there shall have been submitted to, and approved by the Secretary of

the Interior, lists embracing names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

Up to the close of the year the names of 28,016 Cherokee citizens were scheduled. This number included those of both Cherokee and Shawnee blood, and also 1,145 citizens *by intermarriage*, have been aproved by the Secretary of the Interior."

EVERY PERSON ENROLLED BY THE COMMISSION MUST PARTICIPATE IN THE DISTRIBUTION OF THE TRIBAL PROPERTY OF THE CHEROKEE NATION.

We have endeavored to establish to the satisfaction of the Court how the rolls of the Nation must be made, and who, *as citizens of said Nation,* were entitled to enrollment and therefore must be placed on the rolls being made by the Commission to the Five Civilized Tribes. Having settled that proposition, the Agreement itself, in plain, direct and unmistakable terms, settles the "right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind and character." (Letter to Secretary, Rec. p. 2.)

In section 29 of the Agreement mentioned above, we see that the Commission was to prepare the roll in lists in order to expedite the making of the same as well as to expedite the allotment of lands, and, as the lists were prepared, they were to be sent to the Secrtary of the Interior for his approval. As to those lists, the section states that they, when approved by the Secretary of the Interior, (and, if properly made, they must contain the names of all the intermarried citizens we represent), "shall constitute a part and parcel of the *final* roll of citizens of the Cherokee tribe, upon which *allotment of lands* and distribution of other tribal property shall be made." It is therefore as clear as a bell that every citizen who is put on the roll legally prepared by the Commission shall have land allotted to him and tribal money distributed to him.

Lest we fear, however, that that would not be plain enough, the same thing is even more strongly put in different phraseology in section 31, by not only stating to whom the allotments shall be made, but expressly stating to whom they *shall not* be made:

"No person whose name does *not appear* upon the roll prepared as herein provided, shall be entitled to in any manner participate in the distribution of the common property of the tribe, and *those whose names appear thereon shall participate in the manner set forth in this Act.*"

The manner set forth in this Act is that they shall receive the quantity of land mentioned in section 11; that they shall have homesteads as mentioned in section 13, and that they may purchase town lots as mentioned in section 43. No sort of ambiguity about this, but if it were less plainly stated, every rule of construction comes to our aid in construing it as we contend.

The Curtis Act provided for the enrollment of *all citizens* and the allotment of lands to them. Immediately after the passage of the Curtis Act, an election for the purpose of electing a chief for the ensuing four years was held in the Cherokee Nation. There were two parties in the Nation, known as the "Downing" and the "National." "The Downing Party" is composed largely of intermarried citizens. Thomas Buffington, the candidate of that party was elected chief, and held the office for four years. The Curtis Bill had authorized the enrollment of citizens by intermarriage, and allotments to them, and the Court of Claims had said that they had rights to be protected; this Court had said that property rights in the Nation sprang from citizenship and that those complying with the intermarriage laws of the Nation became citizens thereof. Congress, by the Act of 1888, *post,* had declared that a white man marrying an Indian woman, a woman of one of the Five Civilized Tribes, according to the laws of such tribe, acquired the right to tribal property and privileges, and their own council, by the Act of December 16, 1895, had declared what intermarried whites should *not* have property rights in the Nation.

Confronting with these things, it was but natural that the chief question of the campaign was whether or not any agreement which the Nation would make or have to submit to, should provide for the participation of all citizens alike, including the adopted whites, in the distribution of the common property of the Nation, or whether the adopted whites should be given the same recognition in any agreement that the Cherokee Nation should thereafter make with the United States as was given them in the Curtis Bill. The Platform of that party at that election is as follows:

"Whereas, the Congress of the United States has enacted laws in the past few years, and particularly on June 28th, 1898, over the protest of the Cherokee Nation, violative of our treaty rights which destroyed our judicial system, and greatly limited the authority of our judicial system, and greatly limited the authority of our executive and legislative departments, and provided *for a change in our land tenure,* and

"Whereas the Authorities of the Cherokee Nation because of this legislation, are unable to administer our affairs in accordance with our constitution and laws, and inasmuch as there is no forum wherein they can be enforced, and

"Whereas no revenues for the future maintenance of the government can be collected, and

"Whereas the degree of uncertainty which attends the administration of our affairs is destructive of property rights, and paralyzing to business interests, therefore

"The Downing party, if successful in the coming election, pledges its most earnest and conscientious endeavors in obtaining, with rigid economy, a speedy settlement of all our political and *property rights* with the government of the United States to the end that our future political status may be definitely determined and that a *fair and equitable division of all our communal property of every kind and character,* including our lands and moneys, may be made *among all the citizens of the Cherokee Nation*; and to be more definite as to our methods of settlement, we hereby heartily endorse and approve the agreement entered into by and between the Commissions representing the government of the United States and the Cherokee Nation on January 14th, 1899, and favor an extension of the time in said agreement for the ratification of the same by the government of the United States.

"J. T. PARKS,
Chairman.

T. A. CHANDLER,
"Secretary."

The Secretary is a citizen by intermarriage and a party to this suit. The turning point in the election was on that pledge in the platform: That the party was to use its best endeavor in future legislation to see "that a fair and equitable division of all our communal property of every kind and characted including our lands and moneys may be made among *all the citizens* of the Cherokee Nation."

The platform refers to an agreement made January 14, 1899. That agreemnt may be found at Apendix No. 2, page forty-nine of the Sixth Annual Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior for the fiscal year ended June 30, 1899. It provided, in section one, for such an allotment of lands "as to give to *each citizen as hereinafter provided*, an equal share in value of all the lands of the tribe." The directions therein provided for making the rolls of citizens were almost identical with those contained in the Agreement of 1902. For reasons not bearing on this case, this agreement never became a law. Another agreement was made between the Commission and the representative of the Cherokee Nation on the 9th day of April, 1900, and was ratified by Congress March 1, 1901, but failed of ratification by the Nation for reasons that did not involve the questions of citizenship. This agreement is found in 21 Stats., 848. It is in most respects similar to the agreement which was afterward ratified, and whose provisions are now in controversy. They are all harmonious in one respect; no distinction is attempted to be made as to what class of citizens shall or shall not receive lands and moneys, except such intermarried white persons as married after December 16, 1895, but provide first for the ascertainment of who are citizens without reference to any property qualifications, and then for the allotment of lands to such citizens. This was made more explicit, if anything, in the Cherokee Nation than in any other Nation because of the following remark of Chief Justice Fuller in the decision of the case of Stevens vs. the Cherokee Nation, 174 U. S. 488:

"It may be remarked that the legislation (of Congress) seems to recognize, especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to share in the latter would not necessarily follow from the consequence of the former."

This is easily true because a Cherokee might be born after the rolls are closed, and get no land, though he might be a citizen of the Nation, if it was then in existence.

It was the intention, therefore, of the Cherokees to make the question perfectly plain as to when the rolls should close and what class of citizens should be enrolled and what class should not be enrolled, and therefore not participate in the distribution of the lands and

moneys of the tribe, to-wit: Those marrying after December 16, 1895, and those born after September 1st, 1902. The Courts have uniformly decided that this is a question of citizenship alone. Congress, as early as 1888, in an Act relating to intermarriage of whites with the Indians (25 Stats. at Large, 392) recognized the fact that citizens by intermarriage in some of the five civilized tribes were entitled to share in the property of the tribe. Section one is as follows:

"That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian Tribe in the United States, or any of its Territories, except the Five Civilized Tribes in the Indian Territory shall, by such marriage hereafter acquire any right to any tribal property, privilege or interest whatever to which any member of such tribe is entitled."

And this was subsequent to the 1st day of November, 1875, the time fixed by the Court below.

Congress again by the Act which put over the Indian Territory a system of organic laws, on May 2, 1890, (26 Stat. 81) provided that in case of judgments gotten against an adopted citizen of any of the five civilized tribes, the creditor should not sell the improvements of such adopted citizen unless he shall be the owner of improvements on real estate in excess of one hundred and twenty acres, thus recognizing the standard allotment of Indian citizens, and recognizing that when allotments came, the adopted citizens would still have improvements on the real estate of the Nation sufficient to entitle them to standard allotments, and further recognizing that the adopted white citizen had the same rights in the Cherokee Nation that the Indian by blood had so far as the public domain was concerned, and as set out in section 2 of the Constitution of said Cherokee Nation, which provides as follows:

"The lands of the Cherokee Nation shall remain common property, but the improvements made thereon and in the possession of citizens of the Nation are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them."

Almost every adopted citizen of the Nation rightfully held such improvements and exercised those rights mentioned in the Constitution from the date of their marriage up to the present time They were recognized under the Cherokee law and its customs as entitled to own improvements on the public domain of the Chero-

kee Nation, and to transfer them by law as every other citizen, and in case of their dying intestate, they descended under the law of the Nation to their heirs just the same as the improvements and farms of citizens by blood descended to their heirs.

McClellan vs. Pycatt 66 *Fed. Rep.*, 843.

The appellant in the above suit adjudged an adopted white and coming within the provisions of the above act (26 Stat., 81) is a party to the suit.

The Act of the Cherokee Council of 1886 (record page 24) whereby the National Council sought to construe the rights of Cherokee citizenship in the ninth and fifteenth articles of the treaty of 1866, and to declare that none but Cherokees by blood acquired any right or title to the Cherokee domain, or the funds of the Nation, was utterly overthrown in the Whitemire case, Supra. That Act was specially urged by counsel for the Nation in the case, but the position of the Cherokee Nation's great Chief, Bushyhead, was sustained, when he, in a vigorous message, vetoed a similar act of the Council of May 18, 1883. In discussing, in this veto message, the Cherokee constitution and the rights of native born Cherokees thereunder, Bushyhead said:

"Other Indians by adoption and whites regularly adopted are joined with the others equally, and made citizens by the constitution."

After declaring that the property is the common property of the Nation, and settling its citizenship, he said further:

"If the lands of the Nation were and are the common property of its citizens, then no citizen could be deprived of his or her right and interest in the property without doing an injustice and without a violation of the constitution which we are equally bound to observe and defend."

The above is quoted from the Whitmire case, *Supra*

The Court, in its opinion, specially repudiates the Act of April 27th, 1886, and shows that it was passed upon an erroneous idea of the citizenship rights existing in the Cherokee Nation.

30*Court of Claims, page* 152.

All of these things, in our judgment, are admissable and proper, as well as decisive of the question, even if there was anything about the Act that needed construction.

Judge Caldwell, in the case of *Davidson vs. Gibson*, 56 *Fed.* 446, in discussing an Indian proposition, says:

"The Court in making up its opinion of the law in the case, is not limited in its researches to legal literature. It may consult works on collateral sciences or arts, or history touching the topic on trial, and may appeal to the pubilc archives for this purpose."

This Court has held that in construing such laws, the history of the times when the Act was passed may be looked into to ascertain the reason as well as the meaning of the particular provisions of the law; that contemporaneous events can be looked into, including the constitution as it existed, and as it was impressed upon the attention of the legislative body.

U. S. vs. Railway Co., 91 *U. S.* 72.

Holy Trinity Church, vs. U. S. 143 *U. S.* 457.

U. S. vs. Railway Co. 57 *Fed.* 426.

State vs. Nichols, 30 *La. Ann.* 980.

It is immaterial what you call the Act of 1902, whether a treaty, an agreement, or an Act of Congress, it is the supreme law of the land upon the subjects mentioned therein.

Moore vs. Tuttle, 64 *S. W. Rep.* 585.

It is common learning that Congress could any way have amended or repealed any law of the Cherokee Nation, even its constitution. Even if the law was as our opponents contend, it would in no way affect the plain and direct provisions of the agreement. Congress, with the consent of the Nation, which it got in the proper way, could have made a gift of land and money to the intermarried whites. It did so by the Treaty of 1866 to the Freedmen of the Cherokee Nation. They were made citizens, and were given land by the provisions of the treaty. Cherokees made their slaves equal citizens, while the Choctaws and Chickasaws made theirs only limited citizens, giving to theirex-slaves only forty acres of land in event of allotment.

The decision of the Court below seemed to take the view of the law that the Dawes Commission might enroll people who are not to share in the lands and money of the Nation. If such were their view, it is too erroneous, in our judgment, to deserve any extended argument. The language of the Act is too plain. The people before this Court claiming rights by intermarriage in the Cherokee Nation, are either to be enrolled and share in the common property of the Cherokee Nation, or not be enrolled at all. No distinction is made anywhere along the line after 1895, between the political and property rights of the citizens of the Cherokee Nation; in fact, the Act of

1895 negatives any such proposition, and shows clearly that taken in connection with the agreement of 1902, all white persons who married Cherokee women, or white women who married Cherokee men, according to the laws of the Nation, had conferred full rights of citizenship upon them. It was in evidence in this case that when a Cherokee man married a white woman, he conferred upon her the same rights of citizenship as the law conferred upon white men marrying Cherokee women, and the Court found as a fact in its twenty-second finding of fact that:

"Under the custom of the Cherokees a white woman intermarrying with a Cherokee citizen acquired the same rights in respect to property as a white man intermarrying with a Cherokee woman."

Raymond vs. Raymond, Supra.

Nivens vs. Nivens, Supra.

We respectfully submit that this case should be reversed and that a judgment should be entered in accordance with our contentions in this brief.

Respectfully submitted,

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Attorneys for persons claiming rights in the Cherokee Nation through intermarriage.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
FEB 13 1906
JAMES H. MCKENNEY, Clerk.

OCTOBER TERM, 1905.

No. 125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

(19,921, 19,922, 19,923, 19,924.)

Appeals from the Court of Claims.

Brief on Behalf of Persons Claiming Rights of Citizenship in the Cherokee Nation by Intermarriage.

Married-Out and Abandonment Cases.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

(19,921, 19,922, 19,923, 19,924.)

Appeals from the Court of Claims.

Brief on Behalf of Persons Claiming Rights of Citizenship in the Cherokee Nation by Intermarriage.

Married-Out and Abandonment Cases.

Further Assignment of Errors.

In addition to the assignment of errors set out in the brief filed by Messrs. William T. Hutchings and James S. Davenport (p. 5), the Court of Claims erred in holding—

> "that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation, either prior or subsequent to November 1, 1875, and those who intermarried with Cherokees by blood, and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and those white men who, having married Cherokee women and subsequently abandoned their Cherokee wives, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the land or in the distribution of the funds of the Cherokee Nation or people, and are not entitled to be enrolled for such purpose,"

where the facts of such remarriage or abandonment have not been established by the means provided by Cherokee law.

Statement of the Case.

In the opinion of the Court of Claims, by the Chief Justice, in discussing the question of the "married-out and abandonment cases" (Record, p. 41), he says that these are—

> "claimants who allege on the one hand, that they became citizens of the Cherokee Nation by intermarriage, but *concede*, on the other hand, that

> they have since married persons, white persons, having no rights of Cherokee citizenship by blood, or that they have abandoned their Cherokee wives." (The italics are ours.)

An examination of the record will show that the Court of Claims erred in holding that these were *conceded* as facts. This case was tried in the Court of Claims on the pleadings and stipulations filed therein, said stipulations, by the opinion of said court, to stand as the findings of the court for the purposes of appeal (Record, p. 43). These stipulations show (Record, p. 49) merely the use of the words "*of whom it is alleged they were afterward remarried*," etc., and "but who, *it is alleged, have abandoned*," etc. The further facts, in both of these classes of cases, are set out on page 49 of the record, as follows:

> "No proceeding was ever instituted or had against any of these claimants in, nor was there any adjudication had concerning these claimants by the Circuit Court of the Cherokee Nation, nor any other court; but the Commission to the Five Civilized Tribes and the Secretary of the Interior refused to enroll these claimants, independent of the question as to whether they might otherwise be entitled to enrollment, basing such refusal upon their interpretation of the laws of the Cherokee Nation and *testimony of witnesses before said Commission as to the alleged facts of such death and remarriage, . . . and testimony of witnesses before said Commission as to the facts of such abandonment.*"

Acquisition and Forfeiture.

The opinion of the Court of Claims loses sight of the distinction between *acquisition* and *forfeiture* of citizenship. The example given in that opinion is as follows (Record, p. 41):

> ". . . If some such person, resident in the

> United States and therefore owing a local allegiance to this Government (*Carlisle & Henderson's case*, 16 Wall., 147) should bring an action in this court and the Government should file a plea to the jurisdiction averring that the claimant was an alien not entitled to maintain an action against the Government of this country within the intent and meaning of Revised Statutes, section 1068, could such a claimant turn around and say that the question of his citizenship could be inquired into only by office found? Assuredly not."

But this constitutes an entirely different proposition of law from the case at bar, where persons *admittedly citizens* are alleged to have *forfeited* that right.

In the illustration of the chief justice the plaintiff might well be required to establish the *acquisition* of his citizenship in the way specified. The question at bar is, however, what is required to show a *forfeiture* of citizenship by one who has unquestionably acquired such status.

We urge that the commission to the Five Civilized Tribes is limited, in its inquiry in these matters, to the records of the Cherokee Circuit Court mentioned in section 669 of said laws; that it may consider as evidence of abandonment or remarriage any judgment or decree of said court, but may not consider as evidence the testimony of witnesses or the admissions of the applicants.

The requirements to become a citizen by marriage with a Cherokee are very stringent, and are set forth in sections 659 to 664, inclusive, and in effect are a license to be issued only upon affidavit of certain qualifications; a certificate of good character signed by ten citizens and the clerk of the county court; a ten-dollar fee; an oath to support the constitution and laws of the Cherokee Nation; a particular form of marriage; a penalty of $100 *qui tam*, and a record of the marriage certificate. All of this is required to become a citizen by marriage, or, as

as commonly expressed, to "marry in." The act provides in the following sections for what offenses the citizenship thus acquired may be declared forfeited.

"Sec. 665. Every adopted citizen of the Cherokee Nation, by intermarriage or otherwise, who shall use the intercourse law or laws (as they are termed), in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, shall forfeit his rights of citizenship to the same, and be subject to be dealt with as other intruders in the country, and shall be removed out of this nation.

"Sec. 666. Should any man or woman, a citizen of the United States or of any foreign country, become a citizen of the Cherokee Nation by intermarriage, and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry a white man or woman or person (as the case may be) having no rights of Cherokee citizenship by blood; in that case, all of his or her rights acquired under the provisions of this act shall cease.

"Sec. 667. Every person who shall lawfully marry under the provisions of this act, and afterwards abandon his wife, shall thereby forfeit every right and privilege of citizenship of this nation."

Section 668 declares forfeitures of property rights of the husband for abandonment of the wife as follows:

"Sec. 668. Property of every description, possessed within the limits of the Cherokee Nation by an adopted citizen, shall, in case such adopted citizen abandon his wife without lawful cause, be the absolute property of such wife, or wife and her children. But whenever such abandonment shall be planned or effected by the wife for the purpose of ridding herself of her husband, then and in that case such wife shall be entitled to only such property as shall be awarded, upon application of either party for divorce, by the court having jurisdiction."

Nor was the legislature silent as to the *means* of declaring and enforcing these forfeitures. A *complete, exclusive,* and well-defined procedure is given by section 669, as follows:

> "Sec. 669. The circuit court shall have authority to hear and determine all cases that may be brought before it by any person or by the solicitor of the district wherein it may be alleged that a citizen of the United States or of any other government, adopted by intermarriage under the laws of the Cherokee Nation, has forfeited his rights to citizenship in said nation by acts which declare such forfeiture. Proceedings in such cases shall be by citation if the party be resident in the Cherokee Nation, or by thirty days' notice of such proceeding in the *Cherokee Advocate,* and be conducted as are civil suits before such courts. On the finding of verdict by the jury against such person, it shall be the duty of the clerk of the court to notify the principal chief of such finding, and it shall be the duty of the principal chief to make known such finding to, and call on, the United States Indian agent for the removal of such person beyond the limits of the Cherokee Nation. It shall not be lawful thereafter for any clerk to issue a marriage license, or permit, to reside in the Cherokee Nation, in any capacity whatever, to any person so declared to have forfeited his rights of citizenship in the Cherokee Nation" (December 6, 1890).

It is a civil cause, to be conducted regularly, by jury trial after regular process, on pleadings which must aver at least that the defendant has forfeited his rights to citizenship in said nation by acts which declare such forfeiture.

Nothing is to be done, however, except "on the finding by the jury against such person," when the judgment takes effect in a notice by the clerk to the chief, who in turn calls upon the United States Indian agent to enforce what is equivalent to outlawry—a punishment so severe

that it has been abolished in English law. The defendant is to be put out of the nation, deprived of the right to reside in the nation, or to remarry there. Is it any wonder that such a penalty is not under the law to be inflicted except upon trial by jury in the most regular of proceedings?

A Condition Subsequent.

The applicants became citizens lawfully. There is no condition precedent. The charge of abandonment presupposes a proper marriage and the consequent citizenship of the applicant. The remarriage after the death of the first wife likewise concludes that the applicant was a citizen by his first marriage. The act complained of is admittedly one happening after the citizenship was acquired. The condition complained of is a condition subsequent to the vesting of the right.

Nor can it be doubted that it is a valuable right, involving as it does lands and moneys, legal status, subjection to taxation, laws, and courts.

A Grant of Sovereignty.

The right is by grant of the sovereignty of the nation. The nation made them citizens. Without its consent they could not have become citizens, or, once citizens, have renounced allegiance; and we insist, first, that if section 669 had not provided a mode of forfeiture, still the applicants continue to be citizens until a judicial or legislative determination of that status has been made by or on behalf of the Cherokee Nation.

Congress recognized this principle in the act of June 28, 1898, section 21, which is the sole authority of the Commission to act at all. The Commission is directed to enroll "such intermarried white persons as may be entitled to citizenship *under Cherokee laws.*"

These applicants were made citizens by the sovereign power of the Cherokee Nation and continue to be citizens until their rights are forfeited under Cherokee laws, *by the Cherokee Nation.* If it be argued that Congress has plenary power to forfeit these rights, the answer is that Congress has not done so.

This forfeiture is to the nation; the nation's attorneys are insisting on it; the valuable rights revert to the nation. Can the nation take the benefits of a forfeiture without some adjudication of the right?

Office Found.

From the earliest times the doctrine of office found has denied such a procedure.

> "At common law an alien may take realty by act of the grantor and hold it until 'office found,' that is, until the fact of alienage is authoritatively established by a public officer *upon an inquest held at the instance of the Government*" (Anderson's Law Dictionary).
>
> "These inquests of office were devised by law as an authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take nor part from anything. For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon and seize any man's possession upon bare surmises *without the intervention of a jury.*" Blackstone's Com., Book 3, star p. 259.
>
> Phillips *vs.* Moore, 100 U. S., 212.
>
> Hauenstein *vs.* Lynham, 100 U. S., 484.
>
> Fairfax's Devisee *vs.* Hunter's Lessee, 7 Cranch, 604, 621, 622.
>
> New York Indians *vs.* United States, 170 U. S., 1, 24, 25.

". . . But there is one reason assigned by every judicious compiler which, from its good

sense and applicability to the nature of our Government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it. 'Every person,' says he, 'is supposed a natural-born subject that is resident in the kingdom, and that owes a local allegiance to the king, till the contrary be found by office.'" Governeur's Heirs *vs.* Robertson, 11 Wheat., 332, 355, 356.

Status and Collateral Attack.

The same principle is found in the rule that only the sovereignty may dissolve a corporation, though in fact it may have done acts which work a forfeiture under express provision of law. It continues to be a corporation until a direct proceeding is brought by the sovereignty to dissolve it.

Angel and Ames, sec. 774, and cases referred to. Frost *vs.* Frostburg Coal Co., 24 How., 278, 284.

Must Be Direct Proceedings.

The application of the principle above was made in the four cases following, which are exactly in point. These cases all arose under the act of Congress approved March 3, 1865, which provided:

"All persons who have deserted the military and naval services of the United States, who shall not return to said service, or report themselves to a provost marshal, within sixty days after the proclamation hereinafter mentioned, *shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship,* and their rights to become citizens."

Compare this penalty with that of sections 666 and 667, which provided:

"In that case, all his or her rights (of citizenship)

> acquired under the provisions of this act *shall cease.*
>
> "Shall thereby FORFEIT EVERY RIGHT AND PRIVILEGE OF CITIZENSHIP of this nation."

In Huber *vs.* Reiley, 53 Pa. St., 112, the plaintiff offered to vote, was challenged, and was sworn according to law by the defendant, who was a judge of election. On examination the defendant found that plaintiff was a deserter from the army, and that under the act of March 3, 1865, he had forfeited his United States citizenship. Under the Pennsylvania law only citizens of the United States are qualified voters, and the defendant refused to allow plaintiff to vote. For this refusal plaintiff sued, and the question of law raised in the case is the limitation of inquiry by a judge of election on the question as to whether plaintiff was a citizen and particularly as to the forfeiture of citizenship under the act. The court held that the act is highly penal, is to be strictly construed, and can be administered only "by a judicial tribunal authorized to adjudicate it," or by due process of law; that the forfeiture must be "imposed by the same tribunal that was authorized to impose the other penalties for the offense," for which "there can be no substitute," and that he "not having been sentenced to the penalties and forfeitures of the law, was entitled to vote."

In Gotchues *vs.* Matheson, 58 Barbour (N. Y.), 152, the facts are identical with those in Huber *vs.* Reiley, supra, the hearing being upon demurrer to the defense. The court said that:

> "Their duty is to ascertain who are citizens; not to adjudge, declare, and enforce forfeiture of citizenship."
>
> " . . . *They instantly believed the act itself was sufficient to forfeit citizenship, and therefore excluded his vote, whereas they should have gone further and ascertained if the plaintiff had been*

convicted in any court of being a deserter, and of failing to return. If he had been so convicted, his vote should have been excluded; if not, it should have been received. This act doubtless contemplated a trial and conviction before a court martial, and thus to enforce the forfeiture (Huber *vs.* Reiley and others, 53 Penn., 112). . . . *They can determine who are citizens, but they can not adjudge and declare, as an original* ADJUDICATION, that the plaintiff's citizenship has been forfeited by the commission of an offense. They can receive as evidence such an adjudication made by another court, and give effect to its provisions by rejecting the vote, and thus depriving a person of the privilege of citizenship; but further than this I do not see as they can go.

"*But there was no evidence of conviction produced before the inspectors. For that reason there was no evidence of forfeiture of citizenship, and the inspectors had no right to exclude the vote.*"

State *vs.* Symonds, 57 Me., 148: The defendant was indicted for illegal voting. It is claimed by the Government that the defendant was a deserter from the United States Army and had thereby forfeited his right to vote under the act of March 3, 1865, and in order to prove the desertion the Government offered to prove the *admission of the defendant* that he had deserted, and offered to introduce the roll of the company to which he had belonged at the time of the desertion. The evidence was objected to, but the trial court overruled the objection, and the evidence was presented to the jury. The verdict was guilty. On appeal the court says the crime of deserting the Army of the United States is exclusively an offense against the Government of the United States, and can only be inquired into and punished through the courts of the United States having jurisdiction thereof. The court said:

"Any adjudication upon this offense, by State

> tribunals, would be *coram non judice;* . . . *The record of such conviction is the only legal evidence of the fact of desertion before any tribunal where this is brought into question* (Huber *vs.* Reiley, 53 Penn.) . . . for it is not only the right of suffrage, but *all the rights of citizenship, present or prospective,* that this act of Congress visits with its *terrible disabilities and penalties.* . . . Exceptions to the ruling of the court were sustained."

Severance *vs.* Healey, etc., 50 N. H., 448, follows the decisions above.

The above reasoning of the courts is irresistible. A man's citizenship is not forfeited by the mere commission of an act; it continues until an adjudication is had on the act under the law before the proper tribunal, just as a corporation continues to exist until adjudication is had by *quo warranto,* and just as an alien continues to hold title until office found. Comparison of reasons is asked.

The Rule Applied.

Citizenship is a matter between the Government and the citizen who remains a citizen until the Government declares the forfeiture. The duty of the Commission is to enroll only those who are citizens under Cherokee law, just as the judges of election were to permit only citizens of the United States to vote. The right of inquiry here, as there, is limited to the question whether they *became* citizens.

> "There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization (Huber *vs.* Reiley, *supra*)."

These things pertain to the *acquisition* of citizenship, and the Commission may then inquire into the fact of

marriage, its forms, residence, disability to marry or become a citizen, but whether he has committed an offense—

> "and has, as a consequence, forfeited his right, is an inquiry of a different character. Id.
>
> "Their duty is to ascertain who are citizens; not to adjudge, declare, and enforce forfeitures of citizenship." Gotchues *vs.* Matheson, *supra.*
>
> "They can determine who are citizens, but they can not adjudge and declare, as an original adjudication, that the plaintiff's citizenship has been forfeited for the commission of an offense. They can receive as evidence such an adjudication made by another court . . . but further than this I do not see as they can go." Id.

Premise Reasserted.

We here repeat our position, that even if section 669 had never been enacted, the Commission has no authority to inquire into *facts* that may work a forfeiture of citizenship; but their inquiry is limited to the records of an adjudication in a proper tribunal between the Cherokee Nation and the citizen.

Statutory Remedy Exclusive.

But section 669 prescribes the tribunal and the procedure. From the earliest time it has been held that where—

> "a new offense is created by statute, and the special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity, and *coram non judice;* and objections may be taken in any stage of the cause. Hartley *vs.* Hooker, 17 Geo. III., B. R., 1777, reported in 2 Cowp., 523."

That no other proceeding than the one mentioned in

section 669 is lawful will be found upon examination of the following authorities:

Potter's Dwarris on Statutes, p. 275, note 5, and cases cited.

Wait's Actions and Defenses, vol. 2, p. 109, sec. 19; also vol. 1, p. 42, sec. 8.

Endlich on Interpretation of Statutes, sec. 433, note 71.

R. R. Co. *vs.* Tel. Co., 112 U. S., 306, 310.

Section 669 not only directs the manner of procedure, but it also names the particular court in which the proceeding must be brought.

If the enforcing tribunal is specified, the designation forms part of the remedy and all others are excluded.

Potter's Dwarris on Statutes, p. 275, note 5.

Dudley *vs.* Mayhew, 3 N. Y. R., 9.

Almy *vs.* Harris, 5 John., 175.

Miller *vs.* Taylor, 4 Burr, 2322.

Smith *vs.* Lockwood, 13 Barb., 209.

Under Cherokee law, therefore, there was but one way by which applicant's citizenship might be declared forfeited, that is, by the proceeding named in section 669 and by the court named in that section. Where there is no evidence of any such proceeding having been instituted in that court against an applicant, he has not forfeited his rights of citizenship and is entitled to citizenship under Cherokee law. This proposition we deem so elementary as not to need further argument.

We fail to see how any person can come to any conclusion but that the Commission to the Five Civilized Tribes has no jurisdiction to investigate this question under Cherokee law, for even if Congress had intended the Commission so to do, then Congress has failed to provide it with the means. The

Commission has no authority to issue a citation, or to conduct the case as civil suits were conducted before the Cherokee Circuit Court. IT HAS NO JURY, and the forfeiture is to be operative only after verdict by the jury. No proceeding has been brought before it by any person, or by the solicitor of the district. In fact, although the Cherokee law provides in section 669 the only way by which the forfeiture mentioned in sections 667 and 668 is to be enforced, none of those things prescribed by section 669 have been or could have been done by the Commission.

The Supreme Court of the United States did not hesitate, in Railroad Co. *vs.* Telegraph Co., 112 U. S., 310, to limit its own authority, when it said:

> "The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act."

This being so as to the Supreme Court of the United States, is not the Commission to the Five Civilized Tribes likewise limited?

Commission Denied Jurisdiction.

The Commission is not a court of general jurisdiction, and every presumption is against its jurisdiction. It must have the letter of the law in support of its jurisdiction, else it has none. Authorities, it is believed, are not needed in support of that proposition.

Jurisdiction to try questions of forfeiture of citizenship was in the Cherokee Circuit Court originally. By the act of June 28, 1898, that court was abolished and its jurisdiction was conferred, not upon the Commission, but upon "the United States Court in said Territory." Section 28 of the act of June 28, 1898 (30 Stat. L., pp. 495–504), provides:

> "Sec. 28. That on the first day of July, eighteen

> hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, that this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight."

If there were any doubt left as to the jurisdiction of the Commission section 28 removes it by expressly giving the jurisdiction to the court instead of the Commission, and here the express letter of the law denies jurisdiction to the Commission.

It is respectfully submitted:

1. That the question of the status of citizenship is one between the citizen and the nation, which status, once established, continues until the forfeiture is made a solemn matter of record by judicial act or special private legislative act by the nation, declaring forfeiture of the citizenship of the individual.

2. That acts declaring forfeiture of citizenship are highly penal, and are to be strictly construed in favor of the citizen.

3. That independently of section 669 a forfeiture can not be declared as an original adjudication by the Commission to the Five Civilized Tribes, and that the Commission may consider only record evidence of and adjudication by a competent tribunal had in a cause between the nation and the citizen, and may not consider even the admissions of the applicants of the facts themselves, which are declared by the law to work a forfeiture. The

acts themselves do not forfeit citizenship, but citizenship continues until adjudication on the acts under the law.

We concede the right to inquire into the facts by which applicants claim to have become citizens; but, the *status* once established, the rule as to forfeiture is as above stated.

Respectfully submitted.

WM. HENRY WHITE,
A. E. L. LECKIE,
Attorneys for Intermarried Whites.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

Office Supreme Court
FILED
MAR 5 190
JAMES H. McKENN

No. 126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

(19,921, 19,922, 19,923, 19,924.)

Appeals from the Court of Claims.

Cherokee Constitution, Laws, Treaties, Departmental Decisions, and Acts of Congress.

Constitution and Laws of the Cherokee Nation.

An Act Authorizing the Compilation of the Laws of the Cherokee Nation.

Be it enacted by the National Council, That the Principal Chief be, and he is hereby authorized, to appoint two competent persons, one to collect and compile the laws of the Cherokee Nation now in force, and the other to translate the same into the Cherokee language.

It shall be the duty of the compiler to classify and arrange, under appropriate heads, all enactments pertaining to a particular subject; embrace in one act as far as practicable the original acts and amendments thereto, and omit all acts that have been repealed, or have become inoperative by ceasing to be applicable to existing affairs, and to prepare an index to the same.

The work above required shall be commenced and accomplished as soon as practicable; and, when completed, submitted to and approved by the Principal Chief, he shall be, and is hereby, authorized to appoint an Agent, on part of the Cherokee Nation, for the purpose of having the laws, herein authorized to be compiled and translated, correctly published in book form, to the number of one thousand copies in the English language, and one thousand in the Cherokee, as speedily as it can be done, for the use of the courts and citizens of the country. And the Principal Chief is hereby authorized to draw preferred warrants upon the National Treasury upon the certificate of the Agent, approved by the Principal Chief, to liquidate the expenses of said publication.

The compensation of the compiler and translator of the laws, as provided in this act, shall be the sum of three

hundred dollars each, when their work as hereinbefore defined, shall be completed and approved: *Provided*, that the said entire work shall be done, approved, and made ready for publication, on, or before the first day of July, 1881, and the Principal Chief is hereby authorized to draw preferred warrants accordingly.

Approved November 19, 1880.

An Act Authorizing the Translation, etc., of the Laws of 1880.

Be it enacted by the National Council, That the Principal Chief be, and he is hereby authorized, to have the laws and joint resolutions of the regular session of 1880, of the National Council, translated, and added to the English and Cherokee copies of Compiled Laws that he is already authorized to have printed, and the sum of one hundred and twenty-five dollars, or so much thereof as may be necessary, is hereby appropriated out of any money belonging to the General Fund, and not otherwise appropriated, to defray the expenses thereof, and the Principal Chief is hereby authorized to draw preferred warrants to pay for the same.

Approved December 2, 1880.

Appointment of Compiler.

EXECUTIVE DEPARTMENT, CHEROKEE NATION,
TAHLEQUAH, *December 24, 1880.*

Capt. JOHN L. ADAIR, Tahlequah, C. N.

Sir: In accordance with the act of the National Council "authorizing the compilation of the laws of the Cherokee Nation," approved November 19, 1880, you are

hereby respectfully informed that you have been appointed to do the labor and receive the compensation of compiler, pursuant to the provisions of said law, a copy of which is herewith inclosed for your information and guidance.

Respectfully,

(Signed) D. W. BUSHYHEAD,
Principal Chief.

Appointment of Translator.

EXECUTIVE DEPARTMENT, CHEROKEE NATION,
TAHLEQUAH, *December 24th, 1880.*

MR. H. T. LANDRUM.

SIR: Pursuant to the act of the National Council, "authorizing the compilation of the laws of the Cherokee Nation," approved November 19th, 1880, you are hereby respectfully informed that you have been appointed to translate the laws to be compiled according to said act. A copy of the act is herewith furnished you for your information and guidance.

Respectfully,

(Signed) D. W. BUSHYHEAD,
Principal Chief.

An Act Authorizing the Compilation of the Laws of the Cherokee Nation.

Be it enacted by the National Council, That the Principal Chief be, and he is hereby authorized to appoint two competent persons, one to collect and compile the laws of the Cherokee Nation now in force, together with the acts of the present session of the National Council, and the other to translate the same into the Cherokee language. That it shall be the duty of the com-

piler to classify and arrange, under an appropriate head, enactments pertaining to a particular subject; embrace in one act, as far as practicable, the original acts and amendments thereto, and **omit all acts that have been repealed or have become inoperative** by ceasing to be applicable to existing affairs, and to prepare an index to the same.

That the work above required shall be commenced and accomplished as soon as practicable, and when completed submitted to and approved by the Principal Chief.

That the Principal Chief is hereby authorized to appoint an Agent on part of the Cherokee Nation for the purpose of having the laws herein authorized to be compiled and translated, correctly published in book form to the number of two thousand copies in the English language, and one thousand and five hundred copies in the Cherokee language, as speedily as it can be done, for the use of citizens of the Cherokee Nation; *provided*, that the principal Chief shall require every person, before he furnishes any of the books herein provided for, to pay the actual costs per volume for publishing the same; that all moneys received by the Principal Chief on account of such books shall be by him quarterly turned over to the Treasurer of the Cherokee Nation.

Be it further enacted, That the Principal Chief is hereby authorized to draw warrants upon the National Treasury, payable out of any money belonging to the general fund, and not otherwise appropriated, on the certificate of the Agent herein provided for, to liquidate the expenses of said publication.

Be it further enacted, That the compensation of the compiler and the translator of the laws provided for in this act shall be each the sum of five hundred dollars, when their work as herein defined shall be completed and approved; *provided*, That the entire work herein provided for shall be completed, approved, and made

ready for publication on or before the first day of November, 1893, and the Principal Chief is hereby authorized to draw warrants accordingly.

Approved November 26, 1892.

C. J. HARRIS,
Principal Chief.

EXECUTIVE DEPARTMENT, CHEROKEE NATION,
TAHLEQUAH, I. T., *January 3, 1893.*

Capt. J. L. ADAIR, Tahlequah, I. T.

DEAR SIR: I have the honor, as provided by an act of the National Council, entitled an "Act Authorizing the Compilation of the Laws of the Cherokee Nation," approved November 26, 1892, a copy of which is herewith submitted for your information, to inform you that you have been appointed to compile said laws, and receive compensation therefor, as provided in the act above referred to.

Very respectfully,

C. J. HARRIS,
Principal Chief.

EXECUTIVE DEPARTMENT, CHEROKEE NATION,
TAHLEQUAH, I. T., *January 3, 1893.*

WILLIAM EUBANKS, ESQ., Tahlequah, I. T.

DEAR SIR: By authority of the act of the National Council "Authorizing the Compilation of the Laws of the Cherokee Nation," approved November 26, 1892, I have the honor to respectfully inform you that you have been appointed to do the work, and receive the pay of translator, as provided in the foregoing named act, a copy of which is herewith inclosed for your information.

Very respectfully,

C. J. HARRIS,
Principal Chief.

EXECUTIVE DEPARTMENT, CHEROKEE NATION,
TAHLEQUAH, I. T., *April 14, 1893.*

I, C. J. Harris, Principal Chief of the Cherokee Nation, by authority in me vested by an act of the National Council, entitled, "An Act Authorizing the Compilation of the Laws of the Cherokee Nation," approved November 26, 1892, do hereby approve, as the laws of the Cherokee Nation, the compilation of said laws as made by John L. Adair, and translated by William Eubanks, appointed as such compiler and translator in pursuance of said act respectively, contained in this volume; **and do hereby declare the same to be in force as the laws of the Cherokee Nation until repealed or amended by the National Council.**

C. J. HARRIS,
Principal Chief Cherokee Nation.

CONSTITUTION.

The Eastern and Western Cherokees having again reunited, and become one body politic, under the style and title of the CHEROKEE NATION;

Therefore, We, the people of the Cherokee Nation, in National Convention assembled, in order to establish justice, insure tranquillity, promote the common welfare, and to secure to ourselves and our posterity the blessings of freedom—acknowledging with humility and gratitude the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring His aid and guidance in its accomplishment—do ordain and establish this Constitution for the government of the Cherokee Nation.

ARTICLE I.

SECTION 1. The boundary of the Cherokee Nation shall be that described in the treaty of 1833, between the United States and Western Cherokees, subject to such extension as may be made in the adjustment of the unfinished business with the United States.

SEC. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: *provided*, that the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this Nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease; *provided, nevertheless*, that the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission.

Moreover, the National Council shall have power to adopt such laws and regulations as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements, with the view of speculation.

ARTICLE II.

SECTION 1. The power of this government shall be divided into three distinct departments—the Legislative, the Executive, and the Judicial.

SEC. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases hereinafter expressly directed or permitted.

ARTICLE III.

SECTION 1. The legislative power shall be vested in two distinct branches—a National Committee and Council—and the style of their acts shall be: *Be it enacted by the National Council.*

SEC. 2. The National Council shall make provision, by law, for laying off the Cherokee Nation into eight districts; and, if subsequently it should be deemed expedient, one or two may be added thereto.

SEC. 3. The National Committee shall consist of two members from each district, and the Council shall consist of three members from each district, to be chosen by the qualified electors in their respective districts for two years; the elections to be held in the respective districts every two years, at such times and places as may be directed by law.

The National Council shall, after the present year, be held annually, to be convened on the first Monday in October, at such place as may be designated by the National Council, or, in case of emergency, by the Principal Chief.

SEC. 4. Before the districts shall be laid off, any election which may take place, shall be by general vote of the electors throughout the Nation for all officers to be elected.

The first election for all the officers of the government: Chiefs, Executive Council, members of the National Council, Judges, and Sheriffs—shall be held at Tahlequah, before the rising of this convention; and the term of services of all officers elected previous to the first Monday in October, 1839, shall be extended to embrace,

in addition to the regular constitutional term, the time intervening from their election to the first Monday in October, 1839.

SEC. 5. No person shall be eligible to a seat in the National Council but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.

The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor, or trust under this government.

SEC. 6. The electors and members of the National Council shall in all cases, except those of treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and at the National Council, in going to and returning.

SEC. 7. In all elections by the people, the electors shall vote *viva voce*.

All free male citizens, who shall have attained to the age of eighteen years, shall be equally entitled to vote at all public elections.

SEC. 8. Each branch of the National Council shall judge of the qualifications and returns of its own members, and determine the rules of its proceedings, punish a member for disorderly behavior, and, with the concurrence of two-thirds, expel a member; but not a second time for the same offense.

SEC. 9. Each branch of the National Council, when assembled, shall choose its own officers; a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members in such manner

and under such penalty as each branch may prescribe.

SEC. 10. The members of the National Committee shall each receive from the public treasury a compensation for their services, which shall be three dollars per day during their attendance at the National Council; and the members of the Council shall each receive three dollars per day for their services during their attendance at the National Council; *provided*, that the same may be increased or diminished by law; but no alteration shall take effect during the period of service of the members of the National Council, by whom such alteration may have been made.

SEC. 11. The National Council shall regulate by law by whom and in what manner writs of election shall be issued to fill the vacancies which may happen in either branch thereof.

SEC. 12. Each member of the National Council, before he takes his seat, shall take the following oath or affirmation:

I, A. B., do solemly swear (or affirm, as the case may be,) that I have not obtained my election by bribery, threats, or any undue or unlawful means, used by myself or others, by my desire and approbation for that purpose; that I consider myself constitutionally qualified as a member of ———, and that on all questions and measures which may come before me, I will so give my vote, and so conduct myself, as in my judgment shall appear most conducive to the interest and prosperity of this Nation, and that I will bear true faith and allegiance to the same, and to the utmost of my ability and power, observe, conform to, support and defend the Constitution thereof.

SEC. 13. No person who may be convicted of felony shall be eligible to any office or appointment of honor, profit, or trust within this Nation.

SEC. 14. The National Council shall have power to make all laws and regulations which they shall deem

necessary and proper for the good of the Nation, which shall not be contrary to this Constitution.

SEC. 15. It shall be the duty of the National Council to pass such laws as may be necessary and proper to decide differences by arbitration, to be appointed by the parties who may choose that summary mode of adjustment.

SEC. 16. No power of suspending the laws of this Nation shall be exercised, unless by the National Council or its authority.

SEC. 17. No retrospective law, nor any law impairing the obligation of contracts, shall be passed.

SEC. 18. The National Council shall have power to make laws for laying and collecting taxes for the purpose of raising a revenue.

SEC. 19. All bills making appropriations shall originate in the National Committee, but the Council may propose amendments or reject the same. All other bills may originate in either branch, subject to the concurrence or rejection of the other.

SEC. 20. All acknowledged treaties shall be the supreme law of the land, and the National Council shall have the sole power of deciding on the construction of all treaty stipulations.

SEC. 21. The Council shall have the sole power of impeaching. All impeachments shall be tried by the National Committee. When sitting for that purpose, the member shall be upon oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the members present.

SEC. 22. The Principal Chief, Assistant Principal Chief, and all civil officers, shall be liable to impeachment for misdemeanor in office, but judgment in such cases shall not extend further than removal from office, and disqualification to hold any office of honor, trust, or profit under the government of this Nation.

The party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law.

ARTICLE IV.

SECTION 1. The supreme executive power of this Nation shall be vested in a Principal Chief, who shall be styled "The Principal Chief of the Cherokee Nation."

The Principal Chief shall hold his office for the term of four years, and shall be elected by the qualified electors on the same day and at the places where they shall respectively vote for members to the National Council.

The returns of the election for Principal Chief shall be sealed up and directed to the President of the National Committee, who shall open and publish them in the presence of the National Council assembled. The person having the highest number of votes shall be Principal Chief, but if two or more shall be equal and highest in votes, one of them shall be chosen by joint vote of both branches of the Council. The manner of determining contested elections shall be directed by law.

SEC. 2. No person, except a natural born citizen, shall be eligible to the office of Principal Chief; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years.

SEC. 3. There shall also be chosen at the same time by the qualified electors in the same manner, for four years, an Assistant Principal Chief, who shall have attained to the age of thirty-five years.

SEC. 4. In case of the removal of the Principal Chief from office, or of his death or resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Assistant Principal Chief until the disability be removed or the vacancy filled by the National Council.

SEC. 5. The National Council may, by law, provide for the case of removal, death, resignation, or disability of both the Principal and Assistant Principal Chiefs, declaring what officer shall then act as Principal Chief until the disability be removed or a Principal Chief shall be elected.

SEC. 6. The Principal and Assistant Principal Chiefs shall, at stated times, receive for their services a compensation which shall neither be increased or diminished during the period for which they shall have been elected, and they shall not receive within that period any other emolument from the Cherokee Nation or any other government.

SEC. 7. Before the Principal Chief enters on the execution of his office he shall take the following oath or affirmation:

I do solemnly swear, or affirm, that I will faithfully execute the duties of Principal Chief of the Cherokee Nation, and will, to the best of my ability, preserve, protect, and defend the Constitution of the Cherokee Nation.

SEC. 8. He may, on extraordinary occasions, convene the National Council at the seat of government.

SEC. 9. He shall, from time to time, give to the National Council information of the state of the government, and recommend to their consideration such measures as he may deem expedient.

SEC. 10. He shall take care that the laws be faithfully executed.

SEC. 11. It shall be his duty to visit the different districts at least once in two years, to inform himself of the general condition of the country.

SEC. 12. The Assistant Principal Chief shall, by virtue of his office, aid and advise the Principal Chief in the administration of the government at all times during his continuance in office.

SEC. 13. Vacancies that may occur in offices, the appointment of which is vested in the National Council, shall be filled by the Principal Chief during the recess of the National Council by granting commissions which shall expire at the end of the next session thereof.

SEC. 14. Every bill which shall pass both branches of the National Council shall, before it becomes a law, be presented to the Principal Chief. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that branch in which it may have originated, who shall enter the objections at large on their journals and proceed to reconsider it. If, after such reconsideration, two-thirds of that branch shall agree to pass the bill, it shall be sent, together with the objections, to the other branch, by which it shall likewise be reconsidered, and, if approved by two-thirds of that branch, it shall become a law. If any bill shall not be returned by the Principal Chief within five days (Sundays excepted), after the same has been presented to him, it shall become a law in like manner as if he had signed it, unless the National Council, by their adjournment, prevent its return, in which case it shall be a law, unless sent back within three days after their next meeting.

SEC. 15. Members of the National Council, and all officers, executive and judicial, shall be bound by oath to support the Constitution of this Nation, and to perform the duties of their respective offices with fidelity.

SEC. 16. In case of disagreement between the two branches of the National Council with respect to the time of adjournment, the Principal Chief shall have power to adjourn the same to such time as he may deem proper; *provided*, it be not a period beyond the next constitutional meeting thereof.

SEC. 17. The Principal Chief shall, during the session of the National Council, attend at the seat of government.

SEC. 18. There shall be a council composed of five

persons, to be appointed by the National Council, whom the Principal Chief shall have full power at his discretion to assemble; he, together with the Assistant Principal Chief and the counselors, or a majority of them, may, from time to time, hold and keep a council for ordering and directing the affairs of the Nation according to law; *provided*, the National Council shall have power to reduce the number, if deemed expedient, after the first term of service, to a number not less than three.

SEC. 19. The members of the executive council shall be chosen for the term of two years.

SEC. 20. The resolutions and advice of the council shall be recorded in a register, and signed by the members agreeing thereto, which may be called for by either branch of the National Council; and any counselor may enter his dissent to the majority.

SEC. 21. The Treasurer of the Cherokee Nation shall be chosen by a joint vote of both branches of the National Council for the term of four years.

SEC. 22. The Treasurer shall, before entering on the duties of his office, give bond to the Nation, with sureties, to the satisfaction of the National Council, for the faithful discharge of his trust.

SEC. 23. No money shall be drawn from the Treasury but by warrant from the Principal Chief, and in consequence of appropriations made by law.

SEC. 24. It shall be the duty of the Treasurer to receive all public moneys, and to make a regular statement and account of the receipts and expenditures of all public moneys at the annual session of the National Council.

ARTICLE V.

SECTION 1. The judicial powers shall be vested in a Supreme Court, and such circuit and inferior courts as the National Council may, from time to time ordain and establish.

SEC. 2. The Judges of the Supreme and Circuit Courts shall hold their commissions for the term of four years, but any of them may be removed from office on the address of two-thirds of each branch of the National Council to the Principal Chief for that purpose.

SEC. 3. The Judges of the Supreme and Circuit Courts shall, at stated times, receive a compensation which shall not be diminished during their continuance in office, but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under the government of this Nation, or any other power.

SEC. 4. No person shall be appointed a judge of any of the courts until he shall have attained the age of thirty years.

SEC. 5. The Judges of the Supreme and Circuit Courts shall be elected by the National Council, and there shall be appointed in each district as many Justices of the Peace as it may be deemed expedient for the public good, whose powers, duties, and duration in office shall be clearly designated by law.

SEC. 6. The Judges of the Supreme Court and of the Circuit Courts shall have complete criminal jurisdiction in such cases and in such manner as may be pointed out by law.

SEC. 7. No Judge shall sit on trial of any cause when the parties are connected [with him] by affinity or consanguinity, except by consent of the parties. In case all the Judges of the Supreme Court shall be interested in the issue of any cause, or related to all or either of the parties, the National Council may provide by law for the selection of a suitable number of persons of good character and knowledge for the determination thereof, and who shall be specially commissioned for the adjudication of such case by the Principal Chief.

SEC. 8. All writs and other process shall run "In the

name of the Cherokee Nation," and bear test and be signed by the respective clerks.

SEC. 9. Indictments shall conclude "Against the peace and dignity of the Cherokee Nation."

SEC. 10. The Supreme Court shall, after the present year, hold its session annually at the seat of government, to be convened on the first Monday of October in each year.

SEC. 11. In all criminal prosecutions the accused shall have the right of being heard; of demanding the nature and cause of the accusation; of meeting the witnesses face to face; of having compulsory process for obtaining witnesses in his or their favor; and in prosecutions by indictment or information, a speedy public trial, by an impartial jury of the vicinage; nor shall the accused be compelled to give evidence against himself.

SEC. 12. The people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures and searches, and no warrant to search any place, or to seize any person or thing, shall issue, without describing them as nearly as may be, nor without good cause, supported by oath or affirmation.

SEC. 13. All persons shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or presumption great.

ARTICLE VI.

SECTION 1. No person who denies the being of a God or future state of reward and punishment, shall hold any office in the civil department in this Nation.

SEC. 2. The free exercise of religious worship, and serving God without distinction, shall forever be enjoyed within the limits of this Nation; *provided*, that this liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this Nation.

SEC. 3. When the National Council shall determine the expediency of appointing delegates, or other public agents, for the purpose of transacting business with the Government of the United States, the Principal Chief shall recommend, and, by the advice and consent of the National Committee, appoint and commission such delegates or public agents accordingly. On all matters of interest, touching the rights of the citizens of this Nation, which may require the attention of the United States Government, the Principal Chief shall keep up a friendly correspondence with that Government through the medium of its proper officers.

SEC. 4. All commissions shall be "In the name and by the authority of the Cherokee Nation," and be sealed with the seal of the Nation, and signed by the Principal Chief. The Principal Chief shall make use of his private seal until a national seal shall be provided.

SEC. 5. A sheriff shall be elected in each district by the qualified electors thereof, who shall hold his office two years, unless sooner removed. Should a vacancy occur subsequent to an election, it shall be filled by the Principal Chief, as in other cases, and the person so appointed shall continue in office until the next regular election.

SEC. 6. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall the property of any person be taken and applied to public use without a just and fair compensation; *provided*, that nothing in this clause shall be so construed as to impair the right and power of the National Council to lay and collect taxes.

SEC. 7. The right of trial by jury shall remain inviolate, and every person, for injury sustained in person, property, or reputation, shall have remedy by due course of law.

SEC. 8. The appointment of all officers not otherwise

directed by this Constitution shall be vested in the National Council.

SEC. 9. Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education shall forever be encouraged in this Nation.

SEC. 10. The National Council may propose such amendments to this Constitution as two-thirds of each branch may deem expedient, and the Principal Chief shall issue a proclamation, directing all civil officers of the several districts to promulgate the same as extensively as possible within their respective districts at least six months previous to the next general election. And if, at the first session of the National Council after such general election, two-thirds of each branch shall, by ayes and noes, ratify such proposed amendments, they shall be valid to all intents and purposes as parts of this Constitution; *provided*, that such proposed amendments shall be read on three several days in each branch, as well when the same are proposed as when they are ratified.

Done in convention at Tahlequah, Cherokee Nation, this sixth day of September, 1839.

GEORGE LOWREY,
President of the National Convention.

HAIR CONRAD, his X mark,
JOHN BENGE, his X mark,
ARCHIBALD CAMPBELL, his X mark,
THOMAS CANDY,
JOHN DREW,
GEORGE GUESS, his X mark,
WALTER SCOTT ADAIR,
YOUNG ELDERS, his X mark,
WILL SHOREY COODEY,
THOMAS FOREMAN,
RICHARD TAYLOR,

THOMAS FOX TAYLOR,
O-KAN-STO-TAH LOGAN, his X mark,
JAMES SPEARS, his X mark,
JOHN SPEARS,
STEPHEN FOREMAN,
YOUNG GLASS, his X mark,
LOONEY PRICE,
TOBACCO WILL, his X mark,
MAJOR PULLUM, his X mark,
MOSES PARRIS,
GEORGE WASHINGTON GUNTER,
KENCH LOGAN, his X mark,
YOUNG WOLF,
JOSEPH MARTIN LYNCH,
SAL-LA-TEE-SKEE WATTS, his X mark,
GEORGE BREWER, his X mark,
JOSHUA BUFFINGTON,
JESSE BUSHYHEAD,
JESSE RUSSELL,
JOHN FLETCHER BOOT, his X mark,
CRYING BUFFALO, his X mark,
BARK FLUTE, his X mark,
OO-LA-YO-A, his X mark,
SOFT SHELL TURTLE, his X mark,
EDWARD GUNTER,
DANIEL COLSTON, his X mark,
LEWIS ROSS,
GEORGE HICKS,
TURTLE FIELDS, his X mark,
ELIJAH HICKS,
TAHLAH-SEE-NEE, his X mark,
JAMES BROWN,
CHARLES COODEY,
RILEY KEYS,
DANIEL McCOY,
LEWIS MELTON.

Proclamation and Amendments to the Constitution.

ADOPTED NOVEMBER 26, 1866.

Proclamation by the Principal Chief.

WHEREAS, The National Council adopted certain amendments to the Constitution of the Cherokee Nation and submitted the same to a general convention of the people of the Cherokee Nation, called at Tahlequah, on the 26th day of November, A. D. 1866, and which said amendments, with the preamble thereto attached, were in the following words, to wit:

WHEREAS, By the treaty executed at Washington, on the 19th day of July, A. D. 1866, between the United States and the Cherokee Nation, through its delegation, ratified by the Senate and officially promulgated by the President of the United States, August 11, 1866, certain things were agreed to between the parties to said treaty, involving changes in the Constitution of the Cherokee Nation, which changes can not be accomplished by the usual mode; and

WHEREAS, It is the desire of the people and government of the Cherokee Nation to carry out in good faith all of its obligations, to the end that law and order be preserved and the institutions of their government maintained; therefore,

Be it Resolved by the National Council, That the following *amendments* to the Constitution of the Cherokee Nation be submitted to a convention of the Cherokee people, to assemble at Tahlequah, on the twenty-sixth (26th) day of November, A. D. 1866, under the

proclamation of the Principal Chief; and should said amendments hereunto annexed be ratified by said convention, then they shall be officially published and declared by the Principal Chief to be, and shall constitute, a part, or parts, of the Constitution of the Cherokee Nation.

AMENDMENTS.

Amendments to Article I.

SECTION 1. The boundary of the Cherokee Nation shall be that described in the treaty of 1833, between the United States and the Western Cherokees, subject to such modifications as may be made necessary by the 17th article of the treaty concluded at Washington City on the 19th day of July, 1866, between the United States and the Cherokee Nation.

SEC. 2. The lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation.

Amendments to Article III.

SECTION 1. The Upper House of the National Council, known as the National Committee, shall be hereafter known and styled the Senate of the Cherokee Nation, and shall consist of two Senators for every district in the Cherokee Nation.

SEC. 2. The Council shall consist of two members from each district, and when a district shall have to exceed two hundred voters, it shall have an additional member, and for every additional two hundred voters in said district upwards of four hundred, it shall have an addi-

tional member; *provided*, that when any district shall have less than one hundred voters according to the census, it shall still be entitled to one representative.

SEC. 3. In order to ascertain and fix the representation to the Council, provided for by the preceding section, the National Council shall cause to be taken, as soon as practicable, a census of the population of the Cherokee Nation according to districts. A second census shall be taken in like manner in the year 1870 and each ten years thereafter, and the National Council shall regularly apportion representation among the several districts, as provided in the preceding section, agreeably to such census. The first apportionment provided for above shall be made before the first day of June and shall govern the election to be held on the first Monday in August, 1867.

SEC. 4. The National Council shall, after the present year, be held annually, to be convened on the first Monday in November, at such place as may be designated by the National Council, or, in case of emergency, by the Principal Chief.

SEC. 5. *No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation who shall have attained to the age of twenty-five years, and who shall have been a bona fide resident of the district in which he may be elected at least six months immediately preceding such election. All native born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be, citizens of the Cherokee Nation.*

SEC. 6. The members of the National Council shall each receive from the public treasury a compensation for their services, which shall be three dollars per day, during their attendance at the National Council upon any regular session, not exceeding thirty days; *provided*, that the *per diem* allowance may be increased or diminished by law; but no alteration shall take effect during the period of service of the members of the National Council, by whom such alteration may have been made.

SEC. 7. All male citizens who have attained the age of eighteen years shall be deemed qualified electors of the Cherokee Nation, and there shall be no restrictions by law, save such as are required for persons convicted of crime, or for such limit as to residence, not exceeding six months in the district where the vote is offered, as may be required by census or registration.

Amendments to Article V.

SECTION 1. The Supreme Court shall consist of three judges, who shall be elected by the National Council, and whose duties, jurisdiction, and compensation shall be defined by law, in the manner prescribed by the Constitution. The National Council, at its annual session in 1867, shall elect one of the Supreme Judges for three years, one for two years, and one for one year, and at each annual session of the National Council thereafter, shall elect one Supreme Judge, whose official term shall be three years.

SEC. 2. The judges of the Circuit Court shall hereafter be elected by the people, for the term of four years, and shall have the same jurisdiction, discharge the same duties, and be compensated in the same manner as is now provided for by the Constitution. There shall be elected in like manner in and for each district as many judges as it may be deemed expedient for the public good,

whose powers, duties, and duration in office shall be clearly designated by law.

Amendments to Article VII.

SECTION 1. Neither slavery nor involuntary servitude shall ever hereafter exist in the Cherokee Nation, otherwise than in the punishment of crime, whereof the party shall have been duly convicted; and any provision of the Constitution of the Cherokee Nation conflicting with the foregoing section is hereby annulled.

SEC. 2. The persons now holding office shall continue therein, except as may be otherwise expressly provided by law for Canadian district, until their successors be commissioned in November, 1867.

Tahlequah, Cherokee Nation, November 26, 1866.

SMITH CHRISTIE,
President of National Committee.

Concurred: WRITER,
Speaker of Council.

Approved: WILL P. ROSS.

At a general convention of the people of the Cherokee Nation, held at Tahlequah, Cherokee Nation, on the 28th day of November, A. D. 1866, for the purpose of taking into consideration the foregoing *amendments* to the Constitution of the Cherokee Nation; and, whereof, Riley Keys, Chief Justice of the Supreme Court, was chosen President, and Budd Gritts Secretary; the said amendments to the Constitution of the Cherokee Nation were read, considered, and severally approved, and adopted by the Cherokee people.

In testimony whereof, the President and Secretary of said convention have subscribed the same at Tahlequah,

Cherokee Nation, on this the 28th day of November, A. D. 1866.

RILEY KEYS,
President of the Convention.

BUDD GRITTS,
Secretary.

AND WHEREAS, The foregoing amendments to the Constitution were duly submitted to the said general convention of the Cherokee people, and were severally read, considered, and adopted on the 28th day of November, A. D. 1866; now,

Therefore, Be it known that I, William P. Ross, Principal Chief of the Cherokee Nation, do issue this, my proclamation, declaring said amendments to be a part of the Constitution of the Cherokee Nation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, this the 7th day of December, A. D. 1866.

WILL P. ROSS,
Principal Chief.

Departmental Construction of Section 5, Amendments to Article III of the Cherokee Constitution.

I. T. D. J. R. W.
9086-1903 W. C. P.
6554-1904. S. V. P.

DEPARTMENT OF THE INTERIOR,
Office of the Assistant Attorney General,
WASHINGTON.

February 2, 1905.

The Secretary of the Interior.

SIR: I have again considered the record in the case of Allie Williams, applicant for enrollment by the Commission to the Five Civilized Tribes, as a citizen by blood

of the Cherokee Nation, subject of my opinion of November 12, 1904. This reconsideration was informally requested, as counsel for the applicant deemed the conclusion reached to be at variance with departmental decisions of June 10 and 11, 1903, in cases of Martha Hill and James W. Shirley, and also for correction of a supposed error in the statement of facts found by the Commission to the Five Civilized Tribes.

Applicant was born of Cherokee blood, in Tennessee, or North Carolina, about 1869, and was admitted by the National Council, with her parents, December 2, 1892, when about twenty-three years old. In November, 1882, she went to the Nation and remained until July, 1883, when she returned with her parents to Tennessee. Nothing in the record indicates that the family intended to remain in the Nation. Her parents removed to the Nation in 1894, where her father owned a house, and they resided there until his death in 1897. She remained in Tennessee, teaching, until she removed too and settled in the Nation, in 1896, and has since resided there. She is identified on the 1896 census roll, and, as stated by the Commission in a letter of November 30, filed in the case December 7, 1904, is identified on the 1894 strip payment roll. She was properly on that roll, as she was not then barred by the act of December 4, 1894.

September 26, 1900, the Commission directed she be listed for enrollment, but February 2, 1903, receded therefrom, and held that by act of the National Council of December 4, 1894, her failure to remove to and permanently locate in the Nation within six months thereafter, she was barred of her right. March 3, 1903, the Indian Office recommended affirmance of this action, and it was affirmed by the Department March 10, 1903. Later the Department ordered reconsideration, and September 26, 1903, the Indian Office stated its opinion to be that

the act of June 28, 1898 (30 Stat., 495, 502), extended the limit fixed by the Cherokee act of December 4, 1894, to expire June 28, 1898, and that applicant was entitled to enrollment, having removed to and located in the Nation before that time. My opinion being requested, I, December 29, 1903, rendered opinion that the act of December 4, 1894, was within the powers of the Cherokee Council; that the act of June 28, 1898, *supra*, was not inconsistent therewith and did not extend the limit thereby fixed, and that applicant was properly denied enrollment.

A motion for review of that opinion was filed upon two grounds: (1) that applicant in legal effect complied with the Cherokee act of December 4, 1894, when her parents actually removed permanently to the Nation in 1894; (2) that applicant's Cherokee blood and removal to the Nation under section 5 of amendments to Article III of the Cherokee Constitution entitle her to enrollment, her removal having been made before the bar imposed by the act of June 28, 1898.

November 12, 1904, I expressed the opinion that as applicant was of full age and entitled to choose her domicile, her domicile and citizenship were not changed by removal of her family, nor yet by any intent she may have formed until such intent was effectuated by some act; that act and intent must concur to effect such result. This part of the opinion is not excepted to, and I assume that this contention is abandoned.

Section 5, amendments to Article III of the Cherokee Constitution, is as follows:

> "All native born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freed men who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return

> within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be, citizens of the Cherokee Nation."

My opinion of November 12, 1904, in construction of this provision, was thus expressed.

This, in substance, omitting phrases not pertinent to the appellant's case, is that:

> "All native born Cherokees (and) all Indians, . . . who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be, citizens of the Cherokee Nation."
>
> "This amounts to no more than a declaration of what classes of persons then existing constituted the Cherokee Nation. The language is in the present tense, 'who (now) reside.' The applicant, though of Cherokee blood, was not a 'native born Cherokee.'"

It is claimed by counsel for applicant that this language is inconsistent with the construction given to this provision by departmental decisions in cases of James W. Shirley and Martha Hill, *supra*, prepared in my office, and wherein respectively this section of the Constitution was thus construed:

> "This provision does not say 'who now reside.' It is not merely definitive, limited to then existing conditions, but was evidently intended to operate prospectively through all time. . . .
>
> "The constitutional provision cited does not limit the right of descendants of citizens to citizenship to those then resident in the Nation. To give it such restrictive effect, 'now' or some word of like import must be inserted. That such restriction was not intended was indicated by the fact that the right of citizenship was conferred upon one or more classes of persons, some of whom were then absent from the Nation, with a restriction that they should reestablish residence within

six months from July 19, 1866. Descendants from citizens would not be given less time presumably than that given freedmen who were never citizens and had no blood right. As to all citizens of whatever class it provided that 'their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be, citizens.'

"By no recognized rule of statutory or constitutional construction can a limitation to present time be read into a provision which necessarily is intended to operate prospectively through all time."

Upon reexamination of the section, I am of opinion that the intent and scope of the section, and effect to be given its language are properly expressed in the departmental decisions, as above quoted. *The language is in the present tense and the section is definitive of what persons then constituted the Cherokee Nation. It was also intended to operate during the whole continuance of the Cherokee Nation as definitive of what persons at any time then or future are its citizens. The classes mentioned are: (1) native born Cherokees; (2-3) all Indians, and whites legally adopted; (4) all freedmen and colored persons complying with the treaty of 1866; (5) descendants of these classes.*

The present contention is that "native born Cherokees" must be construed as equivalent to "one of Cherokee blood," or descent; that these expressions are synonymous. I can not accede to that contention.

In adopting a constitution the Cherokees were giving a written and definite form to their government. They were already a State, recognized by treaties by the United States, by the treaties of 1833 and 1835 guaranteed a seat and territory as a home, with a title thereto by patent from the United States (7 Stat., 478-480). Native born Cherokees in natural import means persons born to the allegiance of this State, the Cherokee Nation. All

persons born to that allegiance, who resided in the Nation, and had not become expatriated, together with the other classes named, were by this section declared to be citizens of the Cherokee Nation.

This construction is not only the natural import of the words, but harmonizes with the next provision, that Indians or others might be legally adopted—that is, admitted into the Nation. Nothing in the section justifies the construction that one of Cherokee descent, but not member of the Nation, might acquire citizenship by his own act of entering into and settling upon its territory. The constitution of a State is for the purpose of protecting rights of its citizens, and those not of its citizenship can not claim rights thereunder and are not within its purview.

The constitution has never in practice of the Nation been regarded as conferring rights upon persons of Cherokee descent who had not been born to nor admitted to its allegiance. The necessity of their admission was in practice constantly recognized by acts of admission, and acts conferring such powers upon citizenship, courts and commissions.

As said in my former opinion, it was within the legislative powers of the council to fix a period within which one admitted, or a citizen absenting himself should lose his right. That is all that the act of December 4, 1894, attempted to do, and I see no constitutional or other objection to its validity.

In the case of Martha Hill the applicant was of Cherokee blood, her father being admitted by the council after she was of full age. She removed to the Nation in 1886 and ever afterward resided there. She and her children were placed on the tribal rolls of 1890 and 1894, the first of which was prepared under an act containing many provisions for its scrutiny and correction. In Shirley's case the facts were that he was born of a Cherokee

father and white mother, and had always resided in the Nation. He was allowed to vote, and had been convicted before the Indian courts of some offense, sentenced to imprisonment, pardoned and restored to the "full right of citizenship" by the Principal Chief. Such conviction could only have been made of an Indian. His parents were never married. The question involved was, whether the son of a Cherokee citizen and a white woman, born out of wedlock, was a "descendant" from his father. The Department held that "descendants" included illegitimates, and that Shirley's descent from a Cherokee citizen was sufficiently and satisfactorily shown.

In neither of these cases was any question under the Cherokee act of December 4, 1894, involved. Upon full consideration of the question, I am satisfied that the act was a valid exercise of the legislative powers of the Cherokee Nation—not a violation of its constitution; that by failure to return within the time thereby fixed the applicant was barred of right of citizenship of the Nation.

Such holding is not inconsistent with the departmental decisions in Martha Hill or James W. Shirley.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney-General.

Approved: February 2, 1905.

E. A. HITCHCOCK,
Secretary.

The act of December 4, 1894, provides:

> "That all persons who have been or may hereafter be readmitted to citizenship in the Cherokee Nation, are hereby required to permanently locate within the limits of the Cherokee Nation, within six months from the passage of this act, or from the date of the readmission of persons hereafter readmitted, or no rights whatever shall accrue to

such persons by reason of such readmission: Provided, that nothing in this act shall bar minors and orphans."

Articles of Agreement With the Delawares.

Made this 8th day of April, A. D. 1867, between the Cherokee Nation, represented by William P. Ross, Principal Chief, Riley Keys and Jesse Bushyhead, delegates, duly authorized parties of the first part, and the Delaware tribe of Indians, represented by John Connor, Principal Chief, Charles Journeycake, Assistant Chief, Isaac Journeycake and John Sarcoxie, delegates for and on behalf of said Delaware tribe, duly authorized, witnesseth:

Whereas, by the 15th article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country, east of the line of 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus located and the Cherokee Nation, subject to the approval of the President of the United States; *and whereas*, by a treaty between the United States and the Delaware tribe of Indians, ratified August 10th, 1866, the removal of the said Delawares to the Indian country, south of Kansas, was provided for, and in the 4th article whereof an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract the cession of which by the Cherokees to the United States was then contemplated; *and whereas*, no such cession of land was made by the Cherokees to the United States, but in lieu thereof terms were provided, as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; *and whereas*, a full and free conference has been

held between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation; now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres of land for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the office of Indian Affairs, being the list of the Delawares who elect to remove to the "Indian country," to which list may be added, only with the consent of the Delaware Council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto; *and the selections of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee reservation east of said line of 96°, not already selected and in possession of other parties; and in case the Cherokee lands shall hereafter be allotted among the members of said Nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions, when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation; nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same condi-*

tions and restrictions as are, by the laws of the Cherokee Nation, imposed upon the native citizens thereof. PROVIDED, *that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the Constitution and laws of said Cherokee Nation.*

And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees, from the Delaware funds, now held or hereafter received by the United States, a sum of money, equal to one dollar per acre, for the whole amount of 160 acres of land, for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for. And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said lands; but, in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value at the date of such transfer. And the said Delawares further agree that there shall be paid from their funds, now and hereafter to come into possession of the United States, a sum of money, which shall sustain the same proportion to the existing Cherokee National fund that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation. And, for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares; and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken, under the laws of that Nation, within four months, and

properly certified copies thereof filed in the office of Indian Affairs, which shall be the basis of calculation as to the Cherokees. And, that there may be no doubt hereafter as to the amount to be contributed to the Cherokee National fund by the Delawares, it is hereby agreed, by the parties hereto, that the whole of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000. And the Delawares further agree, that in calculating the total amount of said National fund, there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee National fund $1,678,000, and this last mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund; *provided*, that, as the $678,000 of funds now on hand, belonging to the Cherokees, is chiefly composed of stocks of different values, the Secretary of the Interior may transfer, from the Delawares to the Cherokees, a proper proportion of the stocks now owned by the Delawares, of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the *pro rata* contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value. All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under this agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees, of August 11, 1866.

On the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national

funds, as native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees.

WM. P. ROSS,
Principal Chief,
RILEY KEYS,
Cherokee Delegation.

JOHN CONNOR, his X mark,
Principal Chief,
CHARLES JOURNEYCAKE,
ISAAC JOURNEYCAKE,
JOHN SARCOXIE, his X mark,
Delaware Delegation.

Executed and delivered in our presence by the above named delegates of the Cherokee and Delaware Nations, at the city of Washington, in the District of Columbia, the day and year first above written.

JOHN G. PRATT.
WM. A. PHILLIPS.
EDWARD S. MENAGUS.

Ratified by the National Committee, June 15, 1867.

SMITH CHRISTIE,
President Nat. Committee.
JNO. YOUNG,
Speaker of Council.

Agreement Between Shawnees and Cherokees, Concluded June 7th, 1869. Approved by the President, June 9th, 1869.

Articles of Agreement, made and entered into at Washington, D. C., this seventh day of June, A. D. 1869, by and between H. D. Reese and William P. Adair, duly authorized delegates representing the Cherokee Nation of

Indians, having been duly appointed by the National Council of said Cherokees, parties of the first part, and Graham Rogers and Charles Tucker, duly authorized delegates representing the Shawnee Tribe of Indians, parties of the second part, witnesseth:

WHEREAS, It is provided by the fifteenth article of the treaty between the United States and the Cherokee Indians, concluded July 19th, 1866, that the United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with certain provisions specified in said article; and

WHEREAS, The Shawnee Tribe of Indians are civilized and friendly with the Cherokees and adjacent tribes, and desire to settle within the Cherokee country on unoccupied lands east of 96°.

It is therefore agreed, by the parties hereto, that such settlement may be made upon the following terms and conditions, viz:

That the sum of five thousand dollars belonging to the Shawnee Tribe of Indians, and arising under the provisions of treaties between the United States and said Shawnee Indians, as follows, viz:

For permanent annuity for educational purposes, per fourth article treaty, 3d August, 1795, and third article, 10th of May, 1854, one thousand dollars;

For interest, at five per centum, on forty thousand dollars for educational purposes, per third article treaty, 10th May, 1854, two thousand dollars;

For permanent annuity, in specie, for educational purposes, per fourth article treaty, 29th September, 1817, and third article, 10th May, 1854, two thousand dollars; shall be paid annually to the Cherokee Nation of

said Indians, and that the annuities and interest, as recited, and the investment or investments upon which the same are based, shall hereafter become and remain the annuities and interest and investment or investments of the Cherokee Nation of Indians, the same as they have been the annuities and interest and investments of the Shawnee Tribe of Indians. And that the sum of fifty thousand dollars shall be paid to the said Cherokees, as soon as the same shall be received by the United States, for the said Shawnees, from the sale of the lands in the State of Kansas known as the Absentee Shawnee Lands, in accordance with the resolution of Congress, approved April 7th, 1869, entitled: "A resolution for the relief of settlers upon the Absentee Shawnee Lands in Kansas," and the provisions of the treaty between the United States and the Shawnee Indians, concluded May 10th, 1854, and, also, that the said Shawnees shall abandon their tribal organization.

And it is further agreed by the parties hereto that in consideration of the said payments and acts agreed upon, as hereinbefore stated, that the said Cherokees will receive the said Shawnees—referring to those now in Kansas, and, also, to such as properly belong to said tribe who may be at present elsewhere, and including those known as the Absentee Shawnees, now residing in Indian Territory—into the country of the said Cherokees, upon unoccupied lands east of 96°, and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation; PROVIDED, *that all of said Shawnees who shall elect to avail themselves of the provisions of this agreement, shall register their names, and permanently locate in the Cherokee country, as herein provided, within two*

years from the date hereof; otherwise they shall forfeit all rights under this agreement.

IN TESTIMONY WHEREOF, The parties hereto have hereunto subscribed their names and affixed their seals on the day and year first above written.

(Seal) H. D. REESE,
(Seal) WM. P. ADAIR,
Delegates representing the Cherokee Nation of Indians.

(Seal) GRAHAM ROGERS,
(Seal) CHARLES TUCKER,
Delegates representing the Shawnee Tribe of Indians.

Attest:
W. R. IRWIN,
H. E. MCKEE,
A. N. BLACKLEDGE,
JAS. B. ABBOTT.

OFFICE OF THE CLERK
RECEIVED
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SUPREME COURT U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. ~~119~~. 125

DANIEL REDBIRD, ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, Appellants,

vs.

THE UNITED STATES.

No. ~~120~~. 126

THE CHEROKEE NATION, Appellant,

vs.

THE UNITED STATES.

No. ~~121~~ 127

FRANCIS B. FITE, ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION,

Appellants,

vs.

THE UNITED STATES.

No. ~~122~~ 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, Appellants,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

PETITION FOR REHEARING ON BEHALF OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE.

By WILLIAM T. HUTCHINGS,
JAMES S. DAVENPORT,
Their Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 419.

DANIEL REDBIRD, ET AL, CITIZENS OF THE CHEROKEE NATION BY BLOOD, Appellants.

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, Appellant,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE, ET AL, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION,

Appellants,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, Appellants,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

PETITION FOR REHEARING ON BEHALF OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE..

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The citizens claiming rights in the Cherokee Nation by intermarriage come now, and respectfully petition this Honorable Court for rehearing of said cause for the following reasons, to-wit:

First: Because this Court erred in accepting the conclusion of the Court of Claims that "white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood, prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the land constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermarried whites acquire no rights and have no interest or share in *any funds* belonging to the Cherokee Nation, except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the Untied States by patent of December, 1838."

Section 26 of the Cherokee Agreement which this Court was called upon to construe, states that the purpose of the roll was to determine who was entitled "to participate in the distribution of the tribal property in the Cherokee Nation.

Section 29 shows plainly that there was to be no distinction made as to property rights between those who should be placed upon that roll; either a person was not entitled to go upon the roll, or, if his name was placed upon it, then he was to share equally in the lands and tribal property of the nation. This roll was to be prepared in lists, to be approved by the Secretary of the Interior. These lists should contain "the names of all those lawfully entitled to enrollment." Then, in plain, unambiguous language, section 29 of this agreement states that

these lists should constitute the final roll of citizens of the Cherokee Nation, and that upon this roll "allotment of land and distribution of other tribal property shall be made."

To make this more plain, section 31 states that no person whose name does not appear on this roll shall get any of the common property, and then states that "those whose names appear thereon, shall participate in the manner set forth in this Act." What, then, was this manner? It was that every single name upon it shall be entitled equally with every other name to an equal amount of land and the equal distribution of other tribal property. Other provisions of the treaty make impossible any other construction. It is admitted that the intermarried whites who married prior to the 1st day of November, 1875, get allotments. They are therefore allottees. Section 60 of the Cherokee Agreement says that the acceptance of a patent by the allotee serves to relinquish all of his right to the lands of the nation, "except in the proceeds of lands reserved from allotment." It was presumed that there would be more land than was sufficient to give each one an allotment; this was to be sold, and distributed among the citizens. It is plain then that each allottee was to get his share of the proceeds of the sale of this surplus. This is mainly important in construing section 66 of the ageement which says that "all funds of the tribe and all moneys accruing under the provisions of this Act shall be paid out under the direction of the Secretary of the Interior, and, when required, per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior." Undoubtedly it shows that each allottee shares in the proceeds of the sale of surplus land. The foregoing section shows that every man that shares in said money, likewise must share in *all the funds* of the tribe. This is further made plain in section 67 which provides for a "pro rata distribution of the *funds* of the tribe" after its debts are paid, showing clearly that every citizen whose name goes on the roll at all shall be paid a pro rata share

of all the *funds* of the tribe, and all *moneys* arising from the sale of lands reserved from allotment.

There can be no such thing under the agreement as a partial distribution to any set of citizens. A man either shares in no way in the benefits of this agreement, or shares equally with every other citizen entitled to such benefits, the Registered Delawares alone being especially excepted; section 23.

Some exception has been taken to the calling of this agreement a treaty. It is even of greater force and obligation than a treaty. Congress can repeal or modify treaties by an Act of Congress. An Act of Congress can repeal or modify any law of the Cherokee Nation. These propositions are too plain to need argument or citations. This law was ratified by the citizens of the Cherokee Nation, and it stands as the last expression of the law acquiesced in by the United States and the Nation itself. It repealed everything inconsistent with it that went before, and must govern in all matters of citizenship and distribution of the common property of the Nation.

The Curtis Bill, in section 21, stated unequivocally that the rolls so made "shall alone constitute the several tribes which they represent." Every man on the roll is a member of the tribe, and must share with every other member of the tribe in the equal distribution of the tribal property of whatsoever kind or character, except as provided in section 25 of that same Act, which excepted the Delawares, and made them subject to the findings of this Court.

There is no treaty, Cherokee law or Act of Congress making any such distinction, or in any way qualifying the rights of such citizens and we most respectfully submit that the reasoning sustaining the position would hardly "satisfy the son of Caesar."

Second: Because every person whose name appears on the roll of 1880 must be enrolled for the purpose of sharing in the common property of the Nation. It is true that this was a census roll, but Congress and the Nation agreed that the Com-

mission to the Five Civilized Tribes could not go behind that roll. The Act does not say that they must enroll all *citizens* on that roll, but says after denominating it a roll of citizens that the Commission must enroll "all *persons* now living whose names are found on said roll." The Commission was authorized to investigate the right of all other persons found on any *other* rolls, and to omit such as had gotten on those rolls improperly, but they had no authority to look into the name or status of any person whose name was found on the roll of 1880. Language can certainly not be plainer than that. The Court of Claims found in express terms (Record page 60) that the names of certain white persons who only represented a class, appeared on the census roll of 1880, and that those names were the very persons whose names are found on the roll of 1880 and that were referred to and included in section 21 of the Act of Congress of July 28, 1898, commonly called the Curtis Bill. There might be some show of argument if the Commission had been directed to enroll the *citizens* whose names were found on said roll, but nothing can be plainer than the direction which is given in that Act that they should enroll *all persons* whose names are found on said roll. There seems to us no possible escape from this language, whatever construction might be placed upon the balance of the Act. It is true that in section 21, in the latter part of it, is used the expression, "enrolling only such persons as may have lawful right thereto," and that there occurs a somewhat similar expression in the Act of 1900, but the law had already said that all on the roll of 1880 had a lawful right to enrollment, and such expression in section 21 applied to the power given to the Commission to investigate the claims of persons found on other rolls, or who derived rights from other sources, and did not give them any power to investigate the names of persons found on the roll of 1880, and the Commission and the Interior Department have always so construed the Act.

Third: The finding of the Court of Claims was erroneous which held that "those white persons who intermarried with

Delaware or Shawnee citizens of the Cherokee Naton either prior or subsequent to November 1, 1875, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of lands or the distribution of the funds of the Cherokee Nation." The Delawares and Shawnees certainly bought and paid for their rights and when the Delawares became members of the Cherokee Nation, they, under the agreement with the Cherokees, became such members, "with the same rights and immunities * * * * * as native Cherokees."

The agreement with the Shawnees was that they became members of the Nation "on equal terms in every respect and with all the privileges and immunities as native citizens of the Cherokee Nation."

With such rights, and endowed with such privileges for which they paid, marriage to their women or men certainly conferred upon the white person the same rights of property, at least, prior to the 1st day of November, 1875, as marriage with other Cherokee citizens had conferred. This is right and just; they were Cherokees in every respect and the Cherokees could make no law, and did not attempt to do so, that would distinguish between the rights which their blood citizens could confer by marriage and the rights which Delaware and Shawnee citizens could confer by such marriage.

Fourth: If Congress and the Cherokee people had meant to say that no whites should participate in the distribution of the tribal property of the Nation who had intermarried with a Cherokee citizen since the 1st day of November, 1875, it would certainly have been the easiest thing in the world to have said so, and it would have been very strange for them to have set as the time to stop enrolling them a date almost exactly twenty years later. The title to the lands was in the Nation, not held in common by the members. Power was given the intermarried citizens to vote that title out of the nation to the individual citizen; the same law making power could authorize them to vote

it to themselves among other citizens. Everybody so interpreted the language of the Act. It was voted for or against with that construction on its language, and for nearly two years that construction was acted upon and acquiesced in.

Fifth: It is found in the opinion of the Court that the improvements made by all lawfully intermarried whites on the public domain of the Cherokee Nation are their property. Now, this case was submitted early last spring. Had a decision been rendered in the ordinary course of things, they might readily have protected their rights before Congress. If no rehearing is given, the mandate goes down before Congress meets, and creates great confusion in the settlement of questions arising out of such rights. One member of the Court, at least, had resigned prior to the rendering of the decision, and we believe that the ends of justice would be met by at least granting a reasonable time for a rehearing in this case, and that if such is given, we would be enabled to convince the Court that the judgment in this case must in some material points at least be modified.

Your petitioners pray, therefore, that an order may be made for a rehearing of the argument in this case on a day to be appointed by this Court at the present term and upon such points as the Court may direct.

By WILLIAM T. HUTCHINGS,
JAMES S. DAVENPORT,
Their Counsel.

CERTIFICATE OF COUNSEL.

The undersigned counsel for persons claiming rights in the Cherokee Nation by intermarriage, believing that the ends of justice would be served by a rehearing of this case before a full bench, and believing also that the facts stated in the petition for rehearing constitute a good ground for asking a rehearing in this case, so certify in support of the petiton as required by the rule of this Court.

November 17th, 1906.

WILLIAM T. HUTCHINGS,

Of counsel for the persons claiming rights in the Cherokee Nation by intermarriage.

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DEC 8 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Nos. 125, 126, 127, and 128.

DANIEL RED BIRD ET AL., *Citizens of the Cherokee Nation by Blood, Appellants,*
vs.
THE UNITED STATES. } 125.

THE CHEROKEE NATION, *Appellant,*
vs.
THE UNITED STATES. } 126.

FRANCIS B. FITE ET AL., *Intermarried White Persons, Claiming to be Entitled to Citizenship in the Cherokee Nation, Appellants,*
vs.
THE UNITED STATES. } 127.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, *Appellants,*
vs.
THE UNITED STATES. } 128.

APPEALS FROM THE COURT OF CLAIMS.

Come now the Cherokee citizens by blood in the above-entitled cases and move for an amendment to the opinion and judgment of the court, filed November 5, 1906, so as to exclude all intermarried white persons except those two persons who were found by the Court of Claims to have paid into the common treasury of the Cherokee Nation the sum of five hundred dollars.

The decree of the Court of Claims (40 Ct. of Cls., 447) excludes all intermarried whites except those, residing in the Cherokee Nation, who intermarried with Cherokees by blood prior to the 1st day of November, 1875.

This court (page 4, Pamphlet Decree) says:

> "The act (of 1855) was administrative and aimed at subjecting the intermarried whites to the control and dominion of the Cherokee laws instead of leaving them responsible solely to the laws of the Government of the United States. *It contains nothing indicating the intention to confer property rights on intermarried whites.* But in respect of the public domain, the Court of Claims, in the present case, because of the opinion in Journeycake's case, (155 U. S., 196) *assumed* that the acquisition of citizenship under Cherokee laws carried the right to share therein, unless forbidden by such legislation."

Further the court says (pages 5 and 6):

> "Assuming that the national council had authority under the Cherokee constitution of 1839 and the amendments of 1866, to confer on white intermarried citizens the privilege of purchasing a right in the soil and funds of the nation, that privilege was withdrawn in two years and, according to the facts found, was only availed of by two persons, neither of whom was an individual party to the suit. No right in the nation's property flowed from the Cherokee citizenship act, which merely subjected the white man to the jurisdiction of the nation, but that right resulted from express grant and the payment of a price."

The court takes the same view with reference to the amendments to the Cherokee constitution. It says (page 7):

> "We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the national council in respect of the readmission of former members of the nation. The amendment (found in that part of the constitution in respect to offices and elections) must

be taken as a whole, and related to eligibility to a seat in the national council and not to property rights."

Further the court says (page 8):

> "These intermarried whites show no grant of equal rights as members of the Cherokee Nation by treaty or otherwise, nor have they (excepting the two individuals heretofore referred to) paid any sum into the nation's treasury for a pro rata share of its money and lands."

Clearly, the court intended that all intermarried whites should be excluded except the two who have paid into the Cherokee national treasury five hundred dollars each, found as a fact by the Court of Claims.

I respectfully move the court to add to its judgment and opinion the following:

> "The decree of the Court of Claims in this case should be amended by excluding all intermarried white persons, except the two persons who have paid into the Cherokee national treasury the sum of five hundred dollars each, and that as so amended, the decree should be affirmed."

Respectfully submitted,

JOHN J. HEMPHILL,
Attorney for the Cherokee Indians by Blood.

K. S. MURCHISON,
Of Counsel.

OCT 13 1905

JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

DANIEL RED BIRD *et al.*
vs.
THE UNITED STATES. } No. 125

CHEROKEE NATION
vs.
THE UNITED STATES. } No. 126

FRANCIS B. FITE *et al.*
vs.
THE UNITED STATES. } No. 127

PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION
vs.
THE UNITED STATES. } No. 128

MOTION TO ADVANCE.

WM. T. HUTCHINGS,
Attorney for Certain Appellants.

PRESS OF BYRON S. ADAMS

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

DANIEL RED BIRD *et al.* *vs.* THE UNITED STATES.	No. 419.
CHEROKEE NATION *vs.* THE UNITED STATES.	No. 420.
FRANCIS B. FITE *et al.* *vs.* THE UNITED STATES.	No. 421.
PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION *vs.* THE UNITED STATES.	No. 422.

Motion to Advance.

Come now the undersigned, Attorney of Record for various appellants in the above entitled cases, and respectfully moves the Court to advance said cases on the docket, and to assign them for a hearing at as early a date as the convenience of the Court will permit, with direction that all of said cases be heard at the same time.

Statement of the Case.

These four cases have been brought to this Court by appeals from the Court of Claims, in which Court they constituted one case, which was entitled as follows, to wit:

> "In the matter of enrollment of persons claiming rights in the Cherokee Nation by Intermarriage, against the United States, Departmental numbered 76."

They involve the claim of between two and three thousand white persons, who have intermarried with Cherokee citizens, to participate in the distribution of the lands and funds of the Cherokee people, which lands are now being allotted under various Acts of Congress to parties entitled thereto.

The property of the Cherokee people consists of millions of acres of land and large amounts of invested funds, and as this vast estate is in process of distribution, it is necessary to know whether the white persons who are claimants in these cases are to have a share of this property.

The question was first raised before the Secretary of the Interior, who referred the case to the Court of Claims, under the provisions of the Act of Congress, entitled:

> "An Act to afford assistance and relief to Congress and the Executive Departments, in the investigation of claims and demands against the Government." Approved March 3, 1883. (22 Stat., 485.)

By Act of Congress of March 3, 1905 (33 Stat. Pt. 1, p. 1048), entitled:

> "An Act making appropriations for the current and contingent expenses of the Indian Department, et cet., for the year ending June 30, 1906,"

(p. 1071), it was provided:

> "That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation

by intermarriage against The United States, Departmental, Numbered Seventy-six,' now pending in the Court of Claims, the said Court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing."

A final determination of the claim of these several thousand intermarried white persons to share in the property of the Cherokee Indians, is essential in order to enable the Commission to the Five Civilized Tribes to proceed with the allotment of the lands of the Cherokee people, as required by Act of Congress. For this reason, it is a matter of importance to the business of the Government, that these cases should be advanced for argument at an early day.

WM. T. HUTCHINGS,
Attorney for Certain Appellants.

Supreme Court of the United States.

Nos. 125, 126, 127 and 128.—October Term, 1906.

125	Daniel Red Bird et al., Citizens of the Cherokee Nation by Blood, Appellants, *vs.* The United States.	Appeals from the Court of Claims.
126	The Cherokee Nation, Appellant, *vs.* The United States.	
127	Francis B. Fite et al., Intermarried White Persons, Claiming to be Entitled to Citizenship in the Cherokee Nation, Appellants, *vs.* The United States.	
128	The Persons Claiming Rights in the Cherokee Nation by Intermarriage, Appellants, *vs.* The United States.	

[November 5, 1906.]

The subject matter of this suit consists of 4,420,406 acres of land in the Cherokee country about to be allotted among the Cherokee people entitled to participate in the distribution of the common property of the Cherokee Nation. The case was transmitted to the Court of Claims by the Secretary of the Interior on the 24th of February, 1903, the nature of the controversy being thus stated:

"A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens, and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood against the enrollment of intermarried persons, 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character.' It is asserted, on the one hand, that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the nation, and, on the other hand, that the Cherokee laws as well as the laws of Congress recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such nation entitled to share equally with full blooded citizens in the property of the tribe."

Thereafter, Congress, by the act of March 3, 1905, (33 Stat. 1048, 1071, c. 1479,) provided as follows:

"That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, departmental, numbered seventy-six,' now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing."

The Court of Claims filed its opinion May 15, 1905, and on May 18 findings of fact and conclusions of law, and on that day entered its decree as follows:

"This case having been transmitted to this court by the Secretary of the Interior by letter dated February 24, 1903, for the findings and opinion of the court in accordance with the provisions of section 2 of the act of Congress of March 3, 1883, entitled 'An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government,' (22 Stat. 485); and Congress, by the act of March 3, 1905, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1906, and for other purposes,' having made the following enactment:

'That in the case entitled "In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States, departmental, numbered seventy-six," now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing;

"And the cause coming on to be heard upon the petition, answers, agreed facts, proofs and arguments submitted by the attorneys of the parties to the cause, respectively, and the court having heard and fully considered the same;

"And it appearing to the court that all those white persons who married Cherokee Indians by blood subsequently to the enactment of the Cherokee law, which became effective November 1, 1875, and which declared that such persons by intermarriage acquired no rights of soil or interest in the vested funds of the nation, had due notice of the limitations set upon their rights and privileges as citizens; and that those white persons who married Cherokee citizens by blood prior to said date acquired rights as citizens in the lands belonging to the nation and held and owned as national lands, except such of these intermarried persons as lost their rights as Cherokee citizens by abandoning their Cherokee wives or by marrying other white or non-tribal men or women having no rights of citizenship by blood in said Cherokee Nation:

"It is by the court ordered, adjudged, and decreed that such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale, or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; and that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation, and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said nation, and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1, 1875, and those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people, and are not entitled to be enrolled for such purpose."

Cherokee citizens by blood took an appeal to this court from so much of that decree as adjudged that persons intermarrying with Cherokee citizens prior to November 1, 1875, were entitled to share in the Cherokee property, which appeal is numbered in this court 125; and the Cherokee Nation prosecuted a similar appeal, numbered 126. Then certain intermarried whites appealed from the decree except that portion which held that the whites who intermarried prior to November 1, 1875, were entitled to share, numbered 127. And thereafter other intermarried whites appealed generally, numbered 128.

The case is reported in 40 Ct. Claims, 411, where will be found an elaborate statement of the facts, including the acts of the Cherokee National Council, etc., bearing on the subject matter.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Article 1 of the treaty of 1846 declared "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit," and Article 4, that these lands "shall be and remain the common property of the whole Cherokee people."

Section 2 of Article 1 of the Cherokee Constitution (1839) provided that "the lands of the Cherokee Nation shall remain common property."

The amendments of 1866, (Art. 1, Sec. 2,) declared that the lands of the Cherokee Nation "shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20 of the Treaty of the 19th of July, 1866, between the United States and the Cherokee Nation." This request was subsequently duly made and an allotment is taking place accordingly.

The intermarried whites have not acquired the right to share in the lands or funds of the Cherokee Nation by grant in express terms, but that right is claimed in virtue of an alleged citizenship in the Cherokee Nation derived from intermarriage under Cherokee laws.

The Nation, under the treaties, possessed the right of local self government with authority to make such laws as it deemed necessary for the government and protection of persons and property within the country, belonging to its people, "or such persons as have connected themselves with them." Art. 5, Treaty, Dec. 29, 1835, 7 Stat. 478. And Section 14 of Article 3 of the Cherokee Constitution provided: "The National Council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the Nation, which shall not be contrary to this Constitution."

Prior to 1855 certain white persons had married Cherokees, which had given rise to serious questions respecting the status of these persons and the jurisdiction of the Nation over them. The act of Congress of June 30, 1834, (carried forward into sections 2134, 2135, 2147 and 2148 of the Revised Statutes,) provided that a citizen of the United States should not go into the Indian Country without a passport, and that he might be removed therefrom as an intruder. The promise of the United States to remove unauthorized citizens from the Nation appears in the treaties, and even as late as 1893 in the convention by which the Cherokee outlet was ceded to the United States. But the Council could permit certain white persons to reside in the Nation, subject to its laws, though free from the laws relating to intruders.

In these circumstances the Cherokee act of 1855 "regulating intermarriage with white men" was passed. Its purpose is plain and is disclosed by the preamble in these words: "Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws the jurisdiction should be exercised over all persons whatever who may from time to time be privileged to reside within the territorial limits of this Nation, therefore," &c., &c. The act was administrative and aimed at subjecting the intermarried whites to the control and dominion of the Cherokee laws instead of leaving them responsible solely to the laws and authorities of the government of the United States. It contains nothing indicating the intention to confer property rights on intermarried whites. But in respect of the public domain, the Court of Claims, in the present

case, because of the opinion in *Journeycake's case*, 155 U. S. 196, assumed that the acquisition of citizenship under Cherokee laws carried the right to share therein, unless forbidden by such legislation. And Mr. Chief Justice Nott, speaking for the court said: "In 1874 the rapidly growing value of the Cherokee lands was becoming perceptible. On the one hand there were white men who desired to marry into the tribe, and, marrying and residing in the Nation, desired the rights and privileges of citizens; on the other hand there were white adventurers desiring to share in the wealth of the Nation, soon, it was believed, to become available to individual citizens. The public welfare might be benefited by allowing the one, and most certainly would be conserved by excluding the other. No restriction appeared to exist in the constitution which would forbid the National Council from admitting white men to citizenship upon the condition that they should not acquire an estate or interest in the communal or common property of the Nation."

Accordingly, in 1874 the Cherokee National Council adopted a new code containing sections relating to intermarriage, which became effective November 1, 1875, and carried a provision in Article XV, Section 75, reading as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation, unless such admitted citizen shall pay into the general funds of the national treasury a sum of money to be ascertained and fixed by the National Council equal to the '*pro rata*' share of each native Cherokee in the lands and vested wealth of the Nation estimated at five hundred dollars, and thereafter conform to the constitution of the Nation, and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to all the rights of other Cherokees."

On November 28, 1877, the Council amended this proviso by striking out all after the words "this Nation" in the second line thereof, so that the proviso read:

"*Provided, also,* that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this Nation."

The Court of Claims found that the Cherokee law remained unchanged, in this particular, from 1877 to the date of the decree. Something is said about certain compilations of the Cherokee laws of 1880 and 1892, which omitted this part of section 75, but we agree that this omission did not operate to change the existing law, as the acts providing for the compilations did not provide that they should be effective as laws of the Nation, and where an error was committed by the compiler the original law as duly passed and approved must prevail.

Thus it is seen that the privilege of paying $500 into the Cherokee treasury and becoming thereby entitled to "all the rights of other Cherokees" existed only from November 1, 1875, to November 28, 1877. Assum-

ing that the National Council had authority under the Cherokee constitution of 1839 and the amendments of 1866 to confer on white intermarried citizens the privilege of purchasing a right in the soil and funds of the Nation, that privilege was withdrawn in two years and, according to the facts found, was only availed of by two persons, neither of whom was an individual party to the suit. No right in the Nation's property flowed from the Cherokee citizenship act, which merely subjected the white man to the jurisdiction of the Nation, but that right resulted from express grant and the payment of a price. As to the Delawares and Shawnees their participation was specifically provided for by convention, approved by the United States, and depended upon payments made. As to the Freedmen, their participation in property distribution was secured by the terms of the Treaty of 1866, (the result of the civil war), and of the constitutional amendments thereupon adopted. The Court of Claims referred to them thus: "These constitutional amendments were brought about by the action of the United States at the close of the civil war in dictating that the slaves or freed persons of color in the Cherokee country, should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens; but be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States, whereby their former slaves were made their political equals, and the common property of the Cherokees was to be shared in with their servants and dependants, was in effect a revolution. The constitutional amendment quoted was simply declaratory of the new order of things. It is not necessarily prospective, and does not impose limitations upon the legislative power with regard to the naturalization or future adoption of aliens as citizens. Under the polity of the Cherokees, citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund, or never so much as thought of receiving it, form a concrete object lesson in constitutional law not easily effaced from the common mind."

Section 5 of the constitution of 1839 was as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council, but a free Cherokee male citizen, who shall have attained the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs of this Nation, shall be entitled to all the rights and privileges of this Nation, as well as the posterity of the Cherokee

women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

"SEC. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

The amendment of Section 5, in 1866, reads:

"SEC. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the National Council in respect of the readmission of former members of the Nation.

The amendment (found in that part of the Constitution in respect to offices and elections) must be taken as a whole, and related to eligibility to a seat in the National Council and not to property rights. The contention that the words "citizens of the Cherokee Nation" should be construed as relating to the constitutional provision of 1839 that the lands of the Nation should be common property, is without merit in view of the provisions themselves.

By Section 2 of Article 1 of the Constitution of 1839 it was provided that "whenever any citizen shall remove with his effects out of the limits of this Nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease; *provided, nevertheless,* that the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission." By its terms this referred to those who had been citizens, and their readmission gave no rights not originally possessed, and this was true under the amendments of 1866. Many special Cherokee laws demonstrate that the Council did not venture to assume nor desire to assume the power to impart to the white adopted citizen other than civil and political rights.

For instance, the acts of 1878, readmitting Greenway and his children, and Allen and his family "to all the rights and privileges of citizens of the

Cherokee Nation" specifically provided that no rights should be acquired except such as attach to white men, "adopted citizens of the Cherokee Nation."

The acts relating to intermarriage with whites contained many restrictions, but by the act in respect of the intermarriage of Cherokees with other Indians no such restrictions were imposed. Cherokee Act of Nov. 27, 1880. That act provided that the marriage should be contracted according to the law regulating marriages between "our own citizens," and declared that such Indian "shall be and is hereby deemed a Cherokee to all intents and purposes and entitled to the rights of other Cherokees." There is no such language in the acts relating to intermarried whites.

The Treaty of 1866, between the United States and the Cherokee Nation, provided as to the former slaves, that they should be free and they "and their descendants shall have all the rights of native Cherokees."

Article 15 of the same treaty, after providing for the settlement of friendly Indians amongst the Cherokees and the manner in which the latter shall be paid therefor, then stipulates "that they shall be incorporated into and thereafter remain a part of the Cherokee Nation on *equal terms* in every respect with *native Cherokees.*" When the Delawares were about to be moved into the Cherokee country as friendly Indians, it was stipulated in the agreement that "on the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become *members* of the Cherokee Nation, with the *same rights and immunities* and the same participation (and no other) in the national funds as *native Cherokees* . . . and the children thereafter born of such Delawares so incorporated into the Cherokee Nation shall *in all respects be regarded as native Cherokees.*" Later when an agreement was made with the Shawnees, after the amount of money to be paid was provided for, the rights of Shawnees were defined as follows: "and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms *in every respect* and with all the privileges and immunities of native citizens of said Nation."

These intermarried whites show no grant of equal rights as members of the Cherokee Nation by treaty or otherwise, nor have they (excepting the two individuals heretofore referred to) paid any sum into the Nation's treasury for a *pro rata* share of its money and lands.

The Delawares, the Shawnees and the Freedmen acquired their property rights by the express words of treaties, but the intermarried whites cannot point out any such in their favor. Doubtless because of this they have heretofore asserted no claim, although the Cherokee courts were open to them to do so, and have allowed repeated payments of money to be made to every other citizen without question.

The distinction between different classes of citizens was recognized by the Cherokees in the differences in their intermarriage law, as applicable to the whites and to the Indians of other tribes; by the provision in the intermarriage law that a white man intermarried with an Indian by blood acquires certain rights as a citizen, but no provision that if he marries a Cherokee citizen not of Indian blood he shall be regarded as a citizen at all; and by the provision that if, once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen. And the same distinction between citizens as such and citizens with property rights has also been recognized by Congress in enactments relating to other Indians than the Five Civilized Tribes. Act August 9, 1888, 25 Stat. 392, c. 818; Act May 2, 1890, 26 Stat. 96, c. 182; Act June 7, 1897, 30 Stat. 90, c. 3.

In *Whitmire* v. *Cherokee Nation*, 30 Ct. Cl. 138, 152, the Court of Claims said: "Here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country—white men who became citizens by intermarriage." And, after quoting the proviso to section 75, Art. 15, of the Cherokee Code of 1874, the court added: "The idea, therefore, existed both in the minds and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed the 'common property,' 'the lands of the Cherokee Nation.'"

In *Stevens* v. *Cherokee Nation*, 174 U. S. 445, 488, this court, in respect of certain acts of Congress, observed:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

Referring to this, the Court of Claims said in its opinion in the present case, 40 Ct. Cl. 411, 442:

"It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs or to confer upon white citizens property which they were not legally entitled to have. The term 'citizens' in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands."

The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections.

In accepting the conclusion of the Court of Claims in this regard we, nevertheless, deem it proper to somewhat consider the Congressional legislation relied on by the claimants.

The act of Congress of July 1, 1902, (32 Stat. 716, c. 1375,) ratified by the Cherokee Nation, August 7, 1902, and often called the Cherokee agreement, contained these sections:

"SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

"SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

"SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

"SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

"SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The list thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

"SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

"SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act:

Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained."

It thus appears that the roll of citizens of the Cherokee Nation was to be made up as of September 1, 1902, of the persons then living and entitled to enrollment on that date; that all such persons should be placed upon the roll, and that (section 29) on the lists to be finally approved by the Secretary of the Interior there should be placed only the names of those persons found to be entitled to enrollment. In all other respects the roll was to be made in compliance with section 21 of the Act of Congress of June 28, 1898, and of the Act of Congress of May 31, 1900.

Section 21 provided: "That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, . . . with such intermarried white persons as may be entitled to citizenship under Cherokee laws." The roll of 1880, made by the Cherokees, was a census roll, and its confirmation was not intended to create any rights which citizens of the Cherokee Nation had not before enjoyed, but merely to furnish the basis for making up the roll of citizens. Section 21 was in reality a statement that no previous act of Congress was intended to confirm any other roll of the Cherokee Nation.

The Act of May 31, 1900, 31 Stat. c. 598, pp. 221, 236, provided: "That said commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior." Section 31 of the Act of July 1, 1902, says that no person whose name does not appear on the roll made by the Commission to the Five Civilized Tribes "shall be

entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act." In other words, the roll must be made up of citizens who under the laws of the Cherokee Nation were entitled to participation in the distribution of the common property of the Cherokee tribes.

The concluding words of section 21, "with such intermarried white persons as may be entitled to citizenship under Cherokee laws," emphatically indicate that Congress had the Indian citizen in mind in all that went before and limited enrollment of white persons to such as might be entitled to citizenship under Cherokee laws.

Counsel for claimants speak of the Act of 1902 as a "treaty," but it is only an act of Congress and can have no greater effect. It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites. The suggestion is wholly inadmissible that they could vote themselves an interest in the property of the Cherokee people, including a share in the money paid in by the Delawares and the Shawnees, and become thereby wards of this Government.

Referring to section 26 of the Act of 1902, which declares that no white person intermarried since December 16, 1895, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation, and to an act of the Cherokee Council to the same effect, approved December 16, 1895, counsel contend that the act of Congress shows that there was a class of persons who, having married prior to December 16, 1895, were to be enrolled, embracing all lawfully married according to the law of the Nation, and were to participate in the distribution of the tribal property. The doctrine that the denial of a right is the grant of a right is a poor basis for a grant of land. Not a single word of the act intimates that these intermarried persons have or are to have any interest in the property of the Nation, and to hold that because the Act of 1902 declares that white persons intermarrying after 1895 should acquire no property rights the Indians in accepting the act conceded property rights to all who intermarried prior thereto, would put a construction on the act utterly inconsistent with the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter.

After the decision in *Journeycake's case*, 155 U. S. 196, and in that of *Whitmire*, 30 Ct. Cl. 138, 180, the Cherokee National Council passed the act of December 16, 1895, amending certain sections of the compiled laws, from which the provisions of the act of November, 1877, which denied intermarrying whites any right in Cherokee property, had been erroneously omitted, by reenacting the same, but this only evidenced the

determination to prevent the encroachment of the whites upon the property rights of the Cherokee people. The act was clearly passed out of abundant caution and was quite unnecessary in view of the fact that the act of 1877 remained in force, as was found by the Court of Claims.

We are dealing with the right of enrollment so as to entitle the persons enrolled to participate in the distribution of the lands and vested funds of the Cherokee Nation, and not with questions arising in respect of improvements on the public domain. As to improvements they seem to have been treated as those of a tenant who had made them under an agreement that they should remain his. Any citizen of the Nation could use the public domain and it is not asserted that the intermarried whites failed to obtain their share of such use, but because they have enjoyed that benefit, free from tax or burden, is no reason for giving them a share in the lands and vested funds, which has never been granted to them and for which they have never paid.

We concur in the conclusions of the Court of Claims, including the disposition of the particular contention presented in appeal No. 128.

This involved certain claimants, before the court, known as "married out and abandoned whites," who alleged that they became citizens of the Cherokee Nation by intermarriage, but conceded that they had since married persons having no rights of Cherokee citizenship by blood, or had abandoned their Cherokee wives. They contended that they could not be deprived of the rights and privileges acquired by intermarriage save by proceedings in the nature of office found. As to this the Court of Claims said:

"These intermarried whites are not grantees or devisees seized and in possession of land, occupying the position of defendants. They occupy the contrary position—of plaintiffs seeking to recover money—and it is obligatory upon them to establish their right to it. To say that a white man can share in the property of the Cherokees for the reason that at one time in his life he was the husband of a Cherokee woman, and to say that this court or the Secretary of the Interior must hold that he is still the husband of a Cherokee woman because the contrary has not been established in another proceeding, is an appeal to technicality which the court cannot uphold. These claimants, like other plaintiffs, must prove their case; asserting a present right, they must establish present conditions. The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows or widowers), citizenship ceased; that when an intermarried white married a person having no rights of Cherokee citizenship by blood, it was conclusive evidence that the tie which bound him to the Cherokee people was severed and the very basis of his citizenship obliterated.

"The Cherokee statute which has been cited (Laws of 1892, section 669) gives a proceeding in the nature of office found, but, nevertheless, is con-

firmatory of the views hereinbefore expressed. It relates to cases where the Cherokee government takes the initiative to accomplish a purpose. That is to say, where an intermarried white man has forfeited his rights of citizenship in the nation by acts which declare such forfeiture 'and the nation requires his removal beyond the limits of its territory,' this proceeding must be resorted to, to be followed by a call on the United States Indian agent 'to remove such a white man.' It is in principle precisely like the common-law procedure of office found, and exists for the same reason—that the Government may exercise a right dependent upon only the alienage of a person living within its territory presumably a citizen."

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.